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CURRENT TOPICS.

IN calling attention to another of the scurrilous editorials of the St. Louis Globe-Democrat, in which it grossly attacks and insults the entire legal profession, we are sorry to be obliged to point out, as we have done with reference to preceding articles in the same journal, a gross inaccuracy in point of fact. The ranting editorial to which we now allude is found in that journal of March first. It begins by stating that a motion was presented in the St. Louis Bar Association, debated and referred back for revision, to make the fee of the attorney a lien upon the judgment, and thereby give the lawyer a preference, which is enjoyed by no other profession, class or interest in the community. The ignorance betrayed by the writer in the statement that such a measure would give the lawyers a preference which is enjoyed by no other profession, class or interest in the community, is only equaled by his inaccuracy as to the particular fact which forms the text of his complaint. Such a resolution was presented in the St. Louis Bar Association, and debated, and then instead of being referred back for revision, it was laid on the table by a unanimous vote; and that is probably the end of it. The reasons which induced the members of the association to lay the measure on the table have not come to us. The measure, in our judgment, if practicable, is one of simple justice, and would merely give the members of the legal profession in this state a right which they enjoy in many other states of the Union. In England, at common law, an attorney had a lien on a judgment recovered, and could enforce it upon money in the hands of the sheriff. Cross on Liens, 220 *et seq.* In this country, where the two branches of the legal profession, attorneys and barristers, are blended together, the doctrine has been transplanted, and has been repeatedly declared and enforced in several of the states. The supreme court of Missouri, however, has held a contrary doctrine. In Iowa the subject is regulated by a carefully drawn statute; and the resolution which was introduced in the bar association simply recommended, with little alteration, the adoption of this statute. In point of common right it can not be successfully denied, that an attorney ought to have a lien upon a judgment recovered by his diligence, the same as a warehouseman or wharfinger has upon the goods which he has provided with storage, or as a mechanic has upon the house upon which he has performed labor, or as a shoemaker has upon a pair of boots which he has mended. The principle is the same; and if the ill-paid editor (whose article upon this particular question was, however, no doubt worth all he got for it), has not a lien upon the edition of the paper which contains his valuable lucubrations, we can only say that the law is defective in that particular, and we are sorry for him.

AGAIN we call the attention of the profession, and particularly of the active members of bar associations, to the necessity of passing a law in each state providing for the organization of a parliamentary bar. We have had numerous cases, both in Congress and in the state legislatures, where corruption-money was largely used to secure the passage of laws of benefit to individuals or corporations, in which members of such legislative bodies and of the press have received handsome bonuses, undoubtedly designed to secure their influence in a secret and corrupt manner, which, upon exposure, they have endeavored to palm off under the name of fees for "legal services." The last instance of this kind which has come to our knowledge is that of a well-known journalist, who, while perhaps being a member of the bar, is not engaged in practice. The Saint Louis Globe-Democrat has made the exposure the occasion of another one of its abusive tirades against lawyers, forgetting that it was his influence as a journalist, and not as a lawyer, that was corrupted in this way. It never occurred to the over-zealous writer that it belonged, not to the lawyers, but to the republic of outraged journalists, to protest against the bribery as a stigma upon the honor of their order. It would have provoked grim humor to have done so. The idea of a system of honor, ethics, or ordinary morals or decency, as applied to American daily journalism, is a thing which has never entered either the editorial or the public mind. It is well known—or, if it is not well known, it ought to be—that the most deliberate utterances in the editorial columns of some of the daily journals are bought for a dollar a line. Side by side with a tirade against lawyers, you may expect an editorial on the subject of text-books in schools, recommending in a bungling and clumsy manner, that there is need of a change in a certain class of books, but not in another. Which is bought and which is unbought, the public can only conjecture; and one will therefore have as much influence as the other. The legal profession differs from that of journalism in this: In the former there is a recognized possibility of reformation, while the latter is admittedly past redemption's skill. Therefore we say that our different legislatures, state and national, should pass laws defining and regulating legal practice before legislative assemblies. If a lawyer draws a bill, prepares

a brief, or argues before a committee with a view to secure the passage of a law in which a particular person or corporation is interested, he has as clear a right to demand and receive fees therefor, as he has for preparing a case, or a brief, or making an argument in court. In such case he is understood as arguing as a lawyer for a client, and the committee to whom the argument is addressed know, therefore, what weight to attach to his utterances. But if he presents his arguments in the guise of a public benefactor, either in the columns of a public newspaper, or in the halls or lobbies of a legislative assembly, his pockets sweating with money secretly paid him by persons or corporations privately benefited by the proposed measure, he ought to be put in the penitentiary.

THE ILLINOIS WAREHOUSE LAW has been held to be constitutional by the Supreme Court of the United States, Chief Justice Waite delivering the opinion of the court. The question which was passed upon, and which had received an affirmative answer from the supreme court of the State, was whether the General Assembly of Illinois could, under the limitations upon the legislative power of the states imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses in Chicago and other places in the state having not less than 100,000 inhabitants, in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of the different lots or parcels can not be accurately preserved. It was claimed that such a law is repugnant, first—to that part of section 8, article 1, of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several states;" second—to that part of section 9 of the same article, which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another;" third—to that part of the fourteenth amendment which ordains that no state shall "deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In passing upon the first objection, the court said that the warehouses in question are used as instruments by those engaged in state, as well as those engaged in interstate commerce; but they are no more necessarily a part of commerce itself, than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with an interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and certainly, until Congress acts in reference to their interstate relations, the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say, say the court, that a case may not arise in which it will be found that a state, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to interstate commerce; but we do say that, upon the facts as they are presented to us in this record, that has not been done. The second objection—to wit, that the statute in its present form is repugnant to section 9, article 1, of the Constitution of the United States, because it gives preference to the ports of one state over those of another—was disposed of by the single remark, that this provision operates only as a limitation of the powers of Congress, and in no respect affects the states in the regulation of their domestic affairs. The third objection is considered by the Chief Justice at great length, and overruled on the ground that, when private property is devoted to a public use, it is subject to public regulation. "In passing upon this case", say the court, "we have not been unmindful of the vast importance of the questions involved. This, and cases of a kindred character, were argued before us more than a year ago, by the most eminent counsel, and in a manner worthy of their well-earned reputations. We have kept the case long under advisement, in order that the decision might be the result of our mature deliberations." The judgment of the court below will be found reported in 1 Cent. L. J. 89. We shall publish the opinion of the United States Supreme Court in this important case in our next issue.

IN connection with the question as to the best manner of reporting and publishing the decisions of the courts of last resort, with which the legislatures of Missouri and Illinois seem to be wrestling, one or two thoughts may not be inappropriate. In the first place, the judges have a clear right to control the selection of the reporter, and to dismiss him at pleasure. They are peculiarly interested in the manner in which their opinions are reported and given to the public. They are, both in this state and Illinois, an ill-paid body of men, and nothing but the hope of achieving an honorable fame could induce lawyers of the first character to accept such positions. They have, therefore, the same interest and the same right to control the manner in which their written judgments, the substantial muniments of their title to fame and public gratitude, shall be published, as the literary man has in the nomination of his literary executor. Another point is, that, in order properly to discharge his duties as the literary agent of the judge, the reporter must control the publication of his own books. When he is put upon a salary paid by the state, elected or appointed for some stated term, by some power independent of the judges, and is, in a great measure, subject to the control of the whims of a parsimonious or greedy publisher, who, perhaps, is working under a contract with the state so low, that the shabbiest work will not prove remunerative;—under such circumstances no reporter can be expected to perform his functions properly. In

our judgment, no attempt should be made to regulate the business of law-reporting by a law which shall fix an inflexible price at which the reports shall be sold. From one session of the legislature to another the prices of labor and materials may change twenty-five per cent. There has been a shrinkage almost of that amount since the legislature of this state met two years ago, and within the next two years it is not at all unlikely that we shall have a corresponding advance. If this should turn out to be the case, such a contract as has been proposed, one which would oblige the publisher to sell the reports at $2.50, would prove ruinous to any person who could be found foolish enough to undertake it; and our already badly printed reports would become much shabbier than they have heretofore been. It would seem to be a reasonable conclusion, first, that the judges of the supreme court should appoint their own reporter, and have the power to remove him at pleasure; secondly, that the reporter should not receive a remuneration out of the public treasury, but that his remuneration should come from the persons who buy his reports. There is no principle founded on public policy or otherwise, which requires that an officer shall be paid out of the public treasury in order that lawyers may have cheap books. We insist that lawyers are able to pay for their books whatever they may reasonably cost; and we defend the legal profession against the imputation that they are thus to be made objects of public charity. Thirdly, in order to fairly remunerate himself for his labors, the reporter should have control of the printing and selling of his reports; should be left free, subject, of course, to the control of the court appointing him, to print and sell his reports himself, or to place them in the hands of some publishing house. Fourthly, in order to prevent extortion on the part of the reporter or his publisher, the judges of the supreme court, together with the governor, the secretary of state, the attorney-general and the auditor, might be constituted a commission, whose duty it should be to hear evidence, and, upon such evidence, establish and define the manner in which the reports should be printed, and the price at which they should be sold.

FRAUD, WHEN MORTGAGOR IS ALLOWED TO SELL.

The recent opinion of Judge Lowell, in the case of Brett v. Carter, 3 Cent. L. J., 286, has evoked an elaborate and able criticism in the Southern Law Review; and as we differ in some respects from both the judge and his critic, we propose in a few words to contribute somewhat towards an interesting discussion.

We have said that we differ from the critic; yet we are not certain that this difference amounts to anything more than a difference in words. We are half inclined to think that, on more mature reflection, he will find that in substance we agree, and may modify his own language to meet our conceptions of accurate phraseology. For instance, we can not consent to "dispense with the old distinction between actual fraud and constructive fraud." The distinction exists in fact, and divides the cases into two classes, to wit, one where there is an actual design to cheat, and another where the law denounces the transaction as fraudulent, without regard to the motives of the parties. We believe the better course to be to recognize the distinction, and endeavor to find some fundamental principle that will unite and harmonize both classes. The first class consists of those cases that lie, as it were, on the border-land between fraud and good faith. Instances of this kind may be found in conveyances for a valuable consideration, whether the consideration is paid at the time or consists of past indebtedness. In such cases the inquiry is as to the good faith of the parties. If the parties acted honestly, the conveyance is valid; if they intended to defraud, the conveyance is void. In this class, an inquiry into the actual designs of the parties is indispensable, from the very nature of the transactions.

The second class consists of those cases where the act itself is such as the law can not tolerate. As was justly said in Reed v. Pelletier, 28 Mo. 173: "There are many acts, not the result of intentional fraud, which the law, nevertheless, from their tendency to deceive other persons, or from their injurious consequences to the public, prohibits as being within the same reason and mischief as actual fraud." Instances of this kind may be found in voluntary conveyances by insolvent debtors, and assignments for the benefit of creditors, which contain provisions that are calculated to baffle creditors. In such cases, as soon as the facts are ascertained, the transactions are denounced as fraudulent, without regard to the actual motives of the parties. For instance, a voluntary conveyance by an insolvent debtor could not be upheld by proof that the grantor, at the time of making it, never had his creditors in mind at all, but was animated solely by motives of affection for the grantee. Freeman v. Pope, L. R. 5 Ch. 538.

These illustrations show that the two classes differ in their very nature, and this difference leads to a difference in the mode of ascertaining the fraud. In the first class, an inquiry into the fraud is an investigation as to a question of fact. The inquiry is as to whether the parties actually intended to cheat. In the second class, the character of the conveyance alone is ascertained, and then the fraud is declared as a conclusion of law. As the statute, however, only reaches transfers made with the intent to delay, hinder or defraud creditors, a course of reasoning is necessary in order to bring the latter class within the statute. That process is substantially as follows: The law presumes that every one knows the law, and intends to do every act which he deliberately does, and the natural and necessary consequences of such act. Therefore, when fraud is the necessary consequence of an act, or where the law deems an act fraudulent for reasons of public policy, a person

who commits such an act is conclusively presumed to intend to defraud. Whether we say, in such cases, that the law presumes the fraudulent intent, or that the law imputes the fraud to the debtor, makes no difference. The phraseology in the two modes of expression is different, but that is all; the substantial idea is the same in both instances. This peculiar mode of reasoning is not limited to fraudulent conveyances, but pervades other branches of the civil law and abounds in the criminal law. Thus, in criminal law, the essence of an offence is a criminal intent, without which it can not exist. *Actus non facit reum, nisi mens sit rea.* Yet, even here, the law presumes that every one knows the law, that he intends to do what he does willfully, and that he intends the natural and necessary consequences of his act. Therefore, if a man intends, to do what the law forbids, there need not be any other evil intent. But it may be said that this course of reasoning is fictitious, and therefore not philosophical; that it in many cases imputes an intent where no such intent existed. In a certain sense it is at times fictitious; but the certainty of the law and the security of life and property could not otherwise be maintained. Any other course would lead to an investigation in regard to motives, intentions and mental operations, and make the judgments of the law depend on the precarious results of metaphysical inquiries. There are some acts which every one feels to be wrong, and the safety of society demands that the perpetrators shall not be permitted to escape punishment by means of subtle refinements. The doctrine of presumed intent has therefore been generally adopted, and constitutes the solid substructure upon which a large part of the law has been reared. It is philosophical in the highest sense of the term, and, as has been shown, has the advantage of great practical utility.

Having stated wherein we differ from the critic, we will now proceed to point out wherein we differ from Judge Lowell. We hold the better doctrine to be that a chattel mortgage, which contains a power of authorizing the mortgagor to dispose of the goods absolutely for his own benefit, is constructively fraudulent as a matter of law. Judge Lowell holds that such a mortgage is valid, unless there is fraud in fact. If any one will endeavor to analyze the notions involved in the idea of ownership, he will find that they are mainly involved in the conception of dominion, that is, the power of absolute disposition. The man who has the power to sell property absolutely for his own benefit is substantially the owner of that property. This is no novel proposition, but is a fundamental principle on which several classes of cases rest. Thus a general power of appointment makes the donee of the substantial owner of the property; and if he exercise the power to defeat his creditors, the property may be reached by them. Townsend v. Windham, 2 Ves. Sr. 1; Lassels v. Cornwallis, 2 Vern. 465; George v. Milbank, 9 Ves. 180; Whittington v. Jennings, 6 Sim. 493; Bainton v. Ward, 2 Atk. 172; Park v. Bathurst, 3 Atk. 269; Thompson v. Towne, 2 Vern. 319; Stillwell v. Mellersh, 20 L. J. Ch. 356; Tallmadge v. Sill, 21 Barb. 34; Smith v. Garey, 2 Dev. & Bat. Eq. 42. A power of recovation has always been held to render an instrument void, as to both prior and subsequent creditors. Bethel v. Stanhope, Cro. Eliz. 810, Anon., Dyer, 295 a; Rex v. Nottingham, Leane, 42; Tarback v. Marburg, 2 Vern. 510; Peacock v. Monk, 1 Ves. Sr. 127; Jenkyn v. Vaughan, 3 Drew, 419; West v. Snodgrass, 17 Ala. 549. There is no principle on which this proposition can be safely placed, except this, that the power of revocation makes the grantor the substantial owner of the property. Another class of cases in illustration of the same doctrine may be exemplified by this instance: A makes a deed of trust upon the following trusts; 1st, for the use of himself and wife during their joint lives and the life of the survivor, with power to them jointly to dispose of the property absolutely during their joint lives; 2nd, in case A survives his wife, in trust, to permit him to dispose of the property absolutely at his pleasure; 3d, whether he survive her or not, in trust for such person as he may appoint by his will, and in case of failure to appoint then to his heirs at law. Such a deed has been held void, on account of the retention of the power to dispose of the property. Brinton v. Hook, 3 Md. Ch. 477. The same doctrine was applied in Mackason's Appeal, 42 Penn. 330, and Cooledge v. Melvin, 42 N. H. 510.

From these cases the principle may be deduced that the absolute power of disposition is substantial ownership, but liability for debts is an inseparable incident of ownership.* It follows, therefore, that any device by which a person seeks to place a merely nominal title between the property and his creditors, while he retains the absolute power of disposition over it, is in violation of the policy of the law, and therefore fraudulent. This is the principle that is asserted in 3 H. VII., ch. 4, which enacts that "all deeds or gifts of goods and chattels, made or to be made of trust to the use of that person or persons that made the same deed or gift, be void and of none effect."

As a mortgage containing a power for the mortgagor to sell the property absolutely for his own benefit is in violation of this fixed policy of the law, and as every one is presumed to know the law and to intend to do every act which he deliberately does, it is a conclusive presumption of law that a mortgagor in making such a mortgage intends to delay, hinder and defraud his creditor. The act itself is in violation of the law, and no other proof of evil intent is necessary.

The same conclusion may be reached by another course of reasoning. If a mortgagor and mortgagee were to confederate for the express purpose of making such a mortgage as a merely colorable

*NOTE.—To this principle there is an exception, illustrated by the case of Nichols v. Eaton, 1 Otto, 716, 3 Cent. L. J. 38, which holds that a testator has a right to devise property in trust to pay the income to a party free from liability for his debts; but that rests upon the ground that the testator has a right to put such restrictions on the devise as he may deem proper.

cover to shield the mortgagor's property from his creditors, no one would hesitate to declare it void. But such an instrument accomplishes the purpose equally as well when there is no such intent, as when there is. It is always merely a nominal transfer, effective only as against creditors. Since the presence of an actual fraudulent intent does not affect the character of the transaction in the slightest degree, it would seem to follow that an inquiry into such intent is immaterial.

O. F. B.

NOTICE BY PUBLICATION.

One of the means of furnishing constructive notice is by advertisement in a newspaper. The presumption of knowledge arising from this sort of notification is generally regarded as conclusive upon the party to whom it is addressed, when it is published by authority of a statute. Under special circumstances, and for certain purposes, the publication of any fact may go to the jury as evidence tending to prove actual knowledge of such fact in the party to be charged, though the presumptions arising from such publication may be subject to rebuttal. There are cases, however, where the proof of publication of a notice will be conclusive in its effect, when such notice was not specially authorized by statute. As, upon the dissolution of a partnership such publication will protect the retiring partners from liability upon subsequent contracts of the new firm with those who have not been dealers with the old firm, although actual notice to old customers may be necessary. Vernon v. Manhattan Co., 22 Wend. 183; Bristol v. Sprague, 8 *Id.* 423; Watson on Part. 385; Bernard v. Torrence, 5 Gill. & J. 383; Lucas v. Bank of Darien, 2 Stewart, 280; Magill v. Merrie, 5 B. Mon. 168; Simmonds v. Strong, 24 Vt. 642.

No particular form of words is deemed requisite to a notice of this kind. It is sufficient, if it expresses the fact to be communicated with sufficient clearness to be intelligible to a person of ordinary understanding. It is generally, however, required to be published in the paper, or papers printed or circulated in the community where the business of the firm is carried on, and should probably be that paper, in the columns of which they have been accustomed to advertise their business. Bristol v. Sprague, *supra*. See Lovejoy v. Spafford, 4 Cent. L. J. 80. Where, however, the notice is one authorized by statute, and is to operate conclusively upon the party notified, regardless of whether actual knowledge by this means is within the range of probability, or even possibility, much greater strictness is required. As the presumption of knowledge raised by the publication is purely technical, so must it, ordinarily, to be effective, be technically accurate. When service of original process by publication is authorized by statute, any deficiencies in its statements, its time of publication, or other requisites of the statute, can not be supplied by proof of actual knowledge conveyed to the defendant by means of the publication, or other means. Sexton v. Rhomer, 13 Wis. 99; Lovejoy v. Lent, 48 Me. 377.

Involuntary sales of property are usually advertised in this manner, and, for the purposes of treatment here, may be appropriately divided into two classes: 1. Such as are made under a judgment, order, or decree of court; and 2, such as are made without such judgment, order or decree. In general, that strict adherence to the requirements of the statute is not so essential in cases of sales under judgment or decree, in order to sustain the title to property purchased, as it would be, where the sale was authorized without such judgment. The ground of the distinction is that the notoriety of the proceedings in court, which the law presumes, is sufficient notice to the defendant, who is supposed to watch all that follows his bringing into court, until his property has been disposed of. And even where the statute requires the publication of notice, it has been held in some cases that this is merely directory, and that a purchaser at such a sale, held without any notice at all, who purchases in ignorance of the omission of duty by the officer, will take a good title, and the party injured will be compelled to resort to an action against the delinquent officer. Minor v. Natchez, 4 S. & M. 602; Handrick v. Davis, 27 Ga. 167; Johnson v. Reese, 28 Ga. 353; Harvey v. Fisk, 9 Cal. 93. But where the purchaser knew of the failure to advertise, it has been held differently. Hayden v. Dunlap, 3 Bibb. 216; Webber v. Cox, 6 Monr. 110.

When the property is advertised, especially if it be real estate, it should be correctly described in order that the sale may be valid and effective, to vest title even in an innocent purchaser. As where, in Frazier v. Steenrod (7 Ia. 339), the land was described as all the land of the debtor located in a particular county, a purchaser would not be entitled to possession of any land in such county purchased at such sale. Morrison v. Smith, 1 Green Ch. 182; Reynolds v. Wilson, 15 Ill. 394. But immaterial variations or omissions in the advertisement would not only not operate against the title of an innocent purchaser, but, would not furnish grounds for an action against the officer making the sale. As where a sheriff omitted to mention in the advertisement the county in which the land was situated. Duncan v. Motney, 29 Mo. 368. In Tennessee, if defendant is not in possession, the sale would be void unless advertised. Trott v. McGavock, 1 Yerg. 469. And yet, when an advertisement had been published, and before the day of sale as therein specified the original *venditioni exponas* was returned, and an *alias* issued, which was in the hands of the officer at the time of the sale, it was held sufficient without any additional advertisement after the issue of the *alias*. Luther v. McMichael, 6 Humph. 269. A change in the name of the paper, during the publication, would not invalidate the sale. Isaacs v. Shattuck, 12 Vt. 668. Nor is the levy or sale affected by the fact that there is but one advertisement for several executions in the hands of the officer at the same

time. Arnold v. Dunn , 3 Cold. 235. And where the sale was kept open by verbal notice given at the time to those in attendance, to allow the successful bidder to perfect his arrangements for payment, etc., he failing to complete the purchase within the time for which the sale was so held open, and the officer proceeded to sell the property without further publication of notice, such sale was held valid, for the manifest reason that, to have held otherwise, would have been to place it within the power of the defendant to obstruct the sale by colorable bids for an indefinite period. In the application to have the sale set aside, defendant stood upon his strict legal rights, asserting no equity, such as the grossly inadequate price resulting from a failure to re-advertise, which might have entitled him to relief. Isbell v. Kenyon, 33 Mich. 63.

As to notice of time and place of sale of real estate, pursuant to execution, the provisions of the statute must be complied with in every essential particular. As where, under a statute of New York (2 R. S., p. 368, § 34), providing that the notice should be "publicly advertised previously for six weeks successively, as follows:" * * * and after providing for posting such notice in three public places for six weeks, further required a copy to be "printed once in each week, in a newspaper of such county," etc., the notice was posted six full weeks, but published in the newspaper the first time only thirty-nine days prior to the day of sale. Although it had six separate insertions, once in each week for six weeks, such publication was held not to be in compliance with the provisions of the statute, and the sale was declared void. Olcott v. Robinson, 20 Barb. 148; Nolle v. Fenwick, 4 Rand. 594; Elliott v. Eddins, 24 Ala. 509. But when the statute requires the notice to be published "once a week for three months," or "for three successive weeks," the law is satisfied by an insertion in the paper once in each *week*, as time is divided, regardless of the fact that a period longer than seven days intervenes between successive issues of the paper. Rockendorff v. Taylor's Lessee, 4 Pet. 349; Bachelor v. Bachelor, 1 Mass. 256; Pearson v. Bradley, 48 Ill. 520; Cass v. Bellows, 31 N. H. (11 Foster) 501.

Sales of property made in pursuance of a statutory power, and *not* under an order, judgment or decree of court, are aided by no presumptions. To support titles derived under such sales, strict compliance with the requirements of the statute must be shown. And in no particular are the courts more exacting than in matters of notice,—not alone notice to the owners of the property, but notice to the public. Time, terms, place of sale, the amount due, to satisfy which the property is offered, and even the *form* of the notice where that has been prescribed, have all been held material. By much the larger portion of sales of this kind which have been the subject of judicial controversy, on account of alleged failure in the matter of notice, are those made for taxes on real estate. The manner of giving notice of these sales, both to tax-debtors and to the public, is almost universally by advertisement in a newspaper published in the city or county where the lands are situated. When this is the designated mode, the manner prescribed is mandatory upon the officer whose duty it is to make the sale, and a strict compliance with the statutory provisions is an essential prerequisite to the validity of a title derived through such sale. Where the sale is required to be advertised for a specified time, by a designated officer, the advertisement is an official act and must be signed by one who is at the time authorized to act officially in the premises. It is not enough that he is the officer elect, who, after the publication of the notice, became duly qualified. Such subsequent qualification will not by relation clothe the act, performed before he was thereto empowered, with an official character so as to validate his subsequent acts in pursuance thereof. Langdon v. Poor, 20 Vt. 13; Spear v. Ditt, 9 Vt. 282; Broughton v. Journeay, 51 Penn. St. 31. And where the statute required the publication to be in the paper published by the state printer, and after the insertion of the advertisement, but before the time had expired, the publisher of such paper had ceased to be the state printer, such publication was illegal and the sale made thereunder was held void. Bussey v. Leavitt, 3 Fairf. 378; Bussey v. Leavitt, 12 Me. 378; Pope v. Headen, 5 Ala. 433; 4 Hill, 92. In a case under a statute requiring notice to be published that the sale would take place at the expiration of twenty days from the first publication of the notice, and the first publication was on the *eleventh*, but dated the *tenth*, and to the effect that, unless the assessment was paid within twenty days from the date of the notice, the property would be sold, etc., such notice was held insufficient to support a sale thereunder. State v. Newark, 36 N. J. 288.

So, when the advertisement was changed after the expiration of a portion of the time, and a new day of sale fixed, even with the consent of the delinquent, the sale was held void. Scales v. Aves, 12 Ala. 617. However arbitrarily the time may be fixed by statute as to its commencement and termination, it must be followed; though, if a certain number of days are designated, the last publication to be so many days before the sale, the fact that the publication was continued after the day fixed for its termination, would not be regarded as a material variation; but if the full time of publication, as prescribed, be not included between the first day and that fixed for the last publication, by even one day, it would not matter that the entire time for which the notice was published was greater than the statute required, or what extra means were employed to give it publicity,—the failure to give the notice prescribed, and for the prescribed time, would invalidate the sale. In one case in which the question as to the regularity of a sale arose in 1833, which sale took place in 1780, under the provincial act of 26 Geo. II., requiring forty days' notice, the tax for which the land was sold was voted only thirteen days before the date of the

tax-deed. The court, with every inclination towards sustaining a transaction of fifty-three years' standing, held the sale void, as it was impossible that the notice required could have been given under these circumstances. Farrar v. Eastman, 1 Fairf. 191. Where the statute prescribed three months' notice, without stating that it was to be the three months next preceding the sale, and the advertisement was published in December, omitting January, and then in February and March, and the sale took place in April, the court construed the law to mean that the notice should be published for the three months next preceding the sale, and consequently that the sale was void for noncompliance with the terms of the statute. Delogney v. Smith, 3 La. 418. And where "three successive publications in a newspaper three months prior to the sale," was prescribed, it was construed to mean that the last publication should be three months prior to the sale. Bussey v. Leavitt, 3 Fairf. 378. In Francis v. Norris, 2 Miles, 150, "during three successive weeks" is held to mean three full weeks, or twenty-one days. See *In re* Wallace, 2 Pitts. R. 145. Another important requisite of the notice as to time is, that the publication should commence after the tax becomes due; and where any other antecedent duties are prescribed for the officer, such as making a return of the delinquent list and the expiration of a certain time thereafter before the publication of the notice, this time must have elapsed before the first publication, in order that the notice may be sufficient to support a title under the sale. Rockendorff v, Taylor's Lessee, 4 Pet. 364; Early v. Doe, 16 How. (U. S.), 610.

The notice should also contain a correct statement of the amount due, the true object of the tax, an accurate description of the property, and the name of the tax debtor. Washington v. Pratt, 8 Wheat. 681; Pierce v. Richardson, 37 N. H. 306; Alvord v. Collins, 20 Pick. 418. In a case where the form followed was one prescribed by the secretary of the treasury, who was authorized by statute to establish necessary regulations for carrying into effect the provisions of the revenue law, and the notice as published failed to state the name of the tax debtors, or the amount due on each piece of land, the omissions were deemed of sufficient importance to invalidate the sale. Eastman v. Little, 5 N. H. 290; Shimmin v. Inman, 26 Me. 228: Sargent v. Bean, 7 Gray 125. Such sales have frequently been declared void, on account of a misdescription of the property to be sold. Patrick v. Davis, 15 Ark. 363; Tallman v. White, 2 Comst. 66.

When no form is prescribed, the notice should contain everything made requisite by the statute, and should be so expressed as to convey with reasonable certainty the necessary information to the public and the tax debtor. Chandler v. Speer, 22 Vt. 388; Hobbs v. Clements, 32 Me. 67. Where it is necessary to give notice of a discharge of antecedent duties by the officer, they should be recited as facts, and not as conclusions of law. But it has been said, in Blackwell on Tax Titles (page 223), that where a certain form of notice is laid down, it must be "strictly, if not literally, followed." This statement of the doctrine is questioned by Judge Cooley (Cooley on Taxation, 337, *n.* 2), who denies that the law requires a *literal* adhesion to prescribed forms. It may fairly de doubted whether a "literal" adhesion to statutory forms would be insisted upon, even where the law was subjected to its strictest construction. There is also room for a doubt as to whether in all cases even a *literal* compliance would meet the requirements of the law. The prescribed form might not contain sufficient to amount to notice at all to the tax debtor; as where the prescribed form of notice was simply that, at a time uncertain, the officer would proceed to sell all the lands of delinquent tax-payers, without designating names, amount, description, or any of the other essential particulars. It may even be fairly doubted whether the form of notice prescribed in the revenue law of the State of Missouri (Acts, 1871–2, p. 119, § 185 [184]) is sufficient for the purposes it is intended to subserve. Its object is to inform delinquent tax-payers of an intended application to the county court for an order to sell their lands, and in the same notice they are informed that "all of said lands and lots, for the sale of which an order shall be made," will be sold, etc. The names of the tax debtors are not mentioned in the notice, the form of which is prescribed, nor do they seem to be required in the list of lands advertised in conjunction with, and as part of the notice.

The proof of publication ordinarily required is the affidavit of the printer or publisher of the newspaper. If upon the face of the advertisement it appears insufficient, parol testimony is not admissible to explain its defects. Kellogg v. McLaughlin, 8 Ohio, 114; Fitch v. Pincard, 4 Scamm. 69; Nelson v. Pierce, 6 N. H. 194; People v. Highway Comrs. 14 Mich. 528; Lovejoy v. Lent, 48 Me. 377; Sexton v. Rhomer, 13 Wis. 99.

Where an official certificate has been prescribed by statute as the proper means of authenticating the publication of the notice, its statements must be unequivocal and certain in order to support a sale. As where the county auditor was required to publish notices by posting them in certain localities, and his certificate stated that he had delivered the copies to another officer of the county, who, he believed, had posted them in the places designated by law, the certificate was held fatally defective, and its omissions could not be supplied by parol evidence. Doe v. Sweetser, 2 Carter (Ind.), 649. And where the Treasurer failed to authenticate as true a copy of the printed advertisement, this was held to render the sale void. Flint v. Sawyer, 30 Me. 226; Hill v. Mason, 38 *Id.* 461.

Publication is a means authorized by statute in most, if not all the states, for obtaining constructive service of process, in suits brought by attachment, for the foreclosure of mortgages, and other judicial proceedings affecting the property of nonresident or absconding defendants. As this form of summons depends for its validity more upon its

strict conformity to the statute by which it is authorized, than upon any inherent probability of its conveying intelligence of the impending suit to the person whose property is jeopardized, it is subjected to the same strict construction as other published notices. Where the statute authorized a publication after a return upon the original writ of *non inventus*, such a return, made before the return day, will not support a notice by publication, and such published notice could not be aided by parol evidence that the defendant remained absent from the date of the return to the day when the writ was returnable. Schell v. Leland, 45 Mo. 289; Palmer v. Cowdry, 2 Col. 1, and cases cited. In every substantial particular the notice must conform to the statute, and its recitals should be sufficient to inform defendant of the nature of the suit to which he is called upon to answer. As to matters of time of publication, and the term at which defendant is required to answer, the recitals of the notice should be sufficiently explicit and unequivocal to convey the information, without regard to any antecedent knowledge of the defendant, to whom it is addressed. Bobb v. Woodward, 42 Mo. 482; Haywood v. Russell, 44 Mo. 252; Durrossett v. Hale, 38 Mo. 346.

There are, authorized by statute, special proceedings, too numerous for even brief mention here, where the persons to be affected are notified by publication in the newspapers. Among these are proceedings to condemn private property to public use, the letting of contracts for the graduation or improvement of streets and highways, etc. In a case arising under the latter sort of proceeding (Haskell v. Bartlett, 34 Cal. 281), a decision was rendered which would be applicable to a case of notice by publication, for any purpose whatever. The statute required notice of the intention to order the work to be published in the paper having the contract for city and county printing, for ten days, excepting Sundays. Cal. Stats. 1862, p. 403, § 25. The paper having this contract published two editions daily, the morning edition for circulation in the city, and the evening edition for circulation in the country. The notice of intention was published in the morning edition; but for two days of the ten the morning edition was not published, and it did not appear that the evening edition containing the advertisement was circulated in the city. The statute (Cal. Stats. 1856, pp. 163-4, §§ 68-9) required the city printing to be done in a paper published within the city. The publication was held insufficient, as the statute required the paper not only to be printed, but circulated, within the city; such being the construction put upon the word "published."

In proceedings to condemn private property to public use, the failure to publish notice as required by statute might defeat the condemnation; but such failure could not be taken advantage of, when all the parties interested voluntarily appeared. E. Saginaw and St. Clair R. R. Co. v. Benham, 28 Mich. 459.

The above examples will probably illustrate with sufficient amplitude the various circumstances under which notice by publication is warranted, and the degrees of strictness of conformity to statutory rules, varying as the matter published is intended to affect the rights of the individual, to a greater or less extent. When the proceeding is most clearly in derogation of the common law, and the foundation of the liability is farthest removed from the nature of a voluntary contract, the construction is most strictly against the validity of the notice.

There is another important consideration, applicable alike to all cases where notice is authorized by publication in newspapers, and that is—what is a newspaper? It was thought, at one time, that where the publication of notices was directed to be made in a newspaper, without any special designation of any particular paper, the notice should be published in one devoted to the dissemination of general news. But it has been held that any paper, publishing any sort of news—a trade journal, a religious publication, or any sort of paper, circulating in the community where printed, whether its news items are general or special in their character,—will meet the requirements of the law. Following this construction of the statute, it was held in the case of Kellogg v. Corrico, 47 Mo. 157, that a paper devoted to the gathering up and disseminating of legal news was a newspaper within the meaning of the statute, and as such the proper and legal medium for circulating any sort of legal notice required or permitted by statute to be constructively served by publication in a newspaper. And in Illinois, in Kerr v. Hitt, 75 Ill. 51, the decision of the Missouri court was cited with approval and the same opinion expressed. W.

MUNICIPAL BONDS—WAIVER OF CONDITIONS IN SUBSCRIPTION.

STATE *EX REL.* ST. L., C. B. & O. R. R. CO. v. COUNTY COURT OF DAVIESS COUNTY.

Supreme Court of Missouri, October Term, 1876.

HON. T. A. SHERWOOD, Chief Justice.
" W. B. NAPTON, " WARWICK HOUGH, " E. H. NORTON, " JOHN W. HENRY, } Associate Justices.

It is not competent for the voters of a township in Missouri to waive a condition in a subscription to the stock of a railroad company voted by them. Their power to vote such subscription is purely statutory, and exhausts itself when the subscription is assented to.

APPEAL from the Clinton Circuit Court.

Clark & Wait and *Chas. Mead*, for appellant; *Shanklin, Low & McDougal* and *Wm. M. Rush, Jr.*, for respondent.

SHERWOOD, C. J., delivered the opinion of the court:

The return to the alternative writ of mandamus, among other reasons why bonds in the name of the county and on behalf of Benton township should not issue to relator for the construction of its road through that township, alleged that relator had not complied

with the conditions upon which the subscription was made, in this: That relator failed to construct its road or build its depot, within one mile of the town of Pattonburg.

The non-compliance with the conditions was admitted in the reply; but relator attempted to excuse its failure on the grounds that such failure was induced in consequence of, and "at the request and desire" of, the inhabitants of Pattonburg.

It is obvious that this could constitute no valid excuse for the non-performance of the conditions which were the basis of the subscription. For the power of the voters of a township is purely statutory, and exhausts itself, when such voters give expression at the polls to their assent to or dissent from the proposed subscription. Any subsequent action on their part, therefore, being unknown to the law, is possessed of no legal validity, and can by no means absolve the railroad company from the conditions which were imposed at the time the vote to subscribe was taken; and if such results must attend the after-action of the voters of the township, most assuredly no greater effect could be produced in favor of the railroad company, by the "request and desire" of a portion of the inhabitants of the given township.

Since, then, one of the chief essentials of the subscription made by Benton township has not been performed, it was no part of the duty of the county court to depart from the conditions which had been imposed and issue bonds in violation of those conditions. This view renders unnecessary an examination into numerous other points raised and discussed, and leads to an affirmance of the ruling of the lower court in its denial of the peremptory writ. All concur.

THE TAKING AND CERTIFICATION OF DEPOSITIONS DE BENE ESSE.

WILSON SEWING MACHINE CO. v. JACKSON, *EX.*

United States Circuit Court, District of Maryland, February Term, 1877.

Before HON. HUGH L. BOND, Circuit Judge.

1. IN TAKING TESTIMONY DE BENE ESSE, WHAT FORM OF OATH NECESSARY.—In taking the testimony of a witness *de bene esse* under the Revised Statutes of the United States, the witness must be sworn to tell the whole truth, as far as he knows it, respecting, the matter in controversy between the parties. It is not sufficient to swear him to tell the whole truth touching such interrogatories as may be propounded to him.

2. STATUTORY FORM OF OATH—CONSCIENTIOUS SCRUPLES OF WITNESS—CERTIFICATE OF OFFICER.—If there is a statutory form of oath in the place where a witness is examined for the purpose of taking his deposition *de bene esse* that is the form to be used, unless the witness expresses conscientious scruples respecting that form. If he expresses such conscientious scruples, the oath which he regards as binding upon his conscience must be administered to him, and the officer must certify the reason which caused him to vary from the customary or statutory form of oath.

William Daniel and Archibald Stirling, Jr., for plaintiff; *T. M. Lanahan and O. F. Bump*, for defendant

BOND J.:

At the trial of this cause the plaintiff, in support of its claim, offered to read to the jury the deposition of its president, one Wilson, taken *de bene esse*. The defendant objected, on the ground that the statute. (Rev. St., Sec. 864) had not been complied with, the deponent not having been properly cautioned and sworn, and the court sustained the objection, and refused to allow the deposition to be read. The verdict being for the defendant, the plaintiff makes this its motion for a new trial.

It appears from the certificate of the notary who took the deposition, that, in pursuance of the notice given, he attended at the time and place appointed, and that "William G. Wilson, a witness of lawful age, proceeded, on the part of the plaintiff, being by me first duly sworn on interrogatories propounded to him, to testify as is set forth." Originally there followed, after the word "sworn," the words "on the Holy Evangely of Almighty God;" but on cross-examination the witness stated he had not been so sworn, and the notary struck those words out of his certificate. At the close of the deposition the notary certifies, that "William G. Wilson was by me first duly sworn to tell the truth, the whole truth, and nothing but the truth," touching the interrogatories propounded to him; and at the close of his certificate he certified "that the said Wilson was by me sworn on the Holy Evangely of Almighty God."

The statutes of Illinois, the place where this deposition was taken, provide (Rev. St. 1874, ch. 101), "it shall be lawful for any person empowered to administer an oath, to administer it in the following form: The person swearing shall, with his hand uplifted, swear by the ever living God, and shall not be compelled to lay the hand on or kiss the Gospels." The Supreme Court of the United States has determined that the statute now expressed in Sec. 864 of the Revised Statutes is in derogation of the common law, and must be strictly construed and complied with. It required that the party about to testify shall be cautioned and sworn to tell the whole truth, and (be) carefully examined. The first certificate of the notary is that he was duly sworn, and the witness was legally sworn, that is, that he took the oath prescribed by the statute of Illinois. But that is not sufficient. He must be certified, in the form prescribed by the statute, to have sworn to tell the whole truth, not merely that he should true answer make to the interrogatories propounded to him. But the second certificate of the notary is that the witness was first sworn to tell the truth, the whole truth and nothing but the truth, touching the interrogatories propounded to him.

What the witness should have been sworn to do in this *ex parte* proceeding, was to tell the whole truth, as far as he knew it respecting the matter in controversy between the plaintiff and defendant. He might well have told the truth in answer to all questions propounded to him, and then have suppressed facts within his knowledge about which he was not interrogated, and yet those facts might have been of infinite importance to the defendant. But laying this aside, how was the witness sworn on this occasion. The notary further certifies that he was sworn on the Holy Evangely of Almighty God. The witness says he was not. If there be a statutory form of oath in the place where the witness is examined, that is the form to be used upon an examination under Sec. 864 of the Revised Statutes of the United States, unless the deponent expresses conscientious scruples respecting that form. If he expresses such conscientious scruples, the oath which he regards as binding upon his conscience must be administered to him, and the commissioner, or other examining officer must certify the reason which caused him to vary from the customary or statutory form of oath. But in this instance the notary certifies, first, that he duly swore the witness, that is, according to the statutory or customary form; and then he certifies that he swore him according to another form, without alleging any conscientious objections to the statutory form on the part of the witness; and the witness states in his examination that he was not sworn on the Holy Evangely of Almighty God, as the notary certi-

fies he was sworn. The notary had no authority to vary the customary form of oath, unless the witness had conscientious scruples respecting that form, and we suppose he did so vary it because of the witness' scruples. If he did so do, the witness declares he was not sworn at all, and even if he were, the notary does not certify that, under this form, the witness was sworn to tell the whole truth.

There are other reasons filed for a new trial, but they all depend upon the disposition of this question, respecting the admissibility of this deposition, except perhaps one, and that is, that the verdict was contrary to the evidence. We think the jury was right in its finding, and that the verdict must stand.

MOTION DENIED.

NOTE.—This case shows the necessity of exercising great care on taking and certifying depositions *de bene esse*, to be used in the federal courts. The first case bearing on the leading proposition involved in it is that of Garrett v. Woodward, 2 Cranch. C. C. 190. There the witness was affirmed to testify the truth concerning all the matters touching which he should be questioned. The deposition was rejected. The next case was that of Rainer v. Haines, Hemp. 689. There the witness was duly sworn to testify the truth in regard to the matters in controversy. The deposition was suppressed. The next case was that of Shutte v. Thompson, 15 Wall. 151. There it did not appear that the witness was sworn to testify the whole truth. The court held that this defect was sufficient to require the rejection of the deposition, but also decided that the objection had been waived. From this review of the authorities, it will be seen, that the principal proposition involved in this case is fully supported. The forms contained in reliable works on practice in the federal courts are in comformity with this doctrine. O. F. B.

USURY.

COCKLE *ET AL.* v. FLACK *ET AL.*

Supreme Court of the United States, October Term, 1876.

1. COMMISSIONS—USURY—QUESTION FOR JURY.—Where a commission merchant in Baltimore advanced to a pork packer in Peoria $100,000, for which he was to receive interest at the rate of 10 per cent. per annum, and a fixed commission for the sale of the product, to be paid whether it was sold by the commission merchant or not, it was properly left to the jury to decide on all the facts, whether or not the commissions were a cover for usury, or were an honest contract for commission business, in connection with use of money.

2. THE EXPRESS AGREEMENT of ten per cent. is not usurious, because lawful in Illinois, though not so in Maryland. Andrews v. Pond, 13 Peters, 65, re-affirmed.

Mr. Justice MILLER delivered the opinion of the Court:

Plaintiffs in error were engaged in the business of packing pork in Peoria, Illinois, and the defendants were commission merchants at Baltimore, in the fall of 1872, when the contract was made which is the foundation of this suit. There had been transactions between the parties the previous year in the line of their business; and with reference to the packing business of the approaching season this agreement was made by letter. The substance of it is that defendants should advance to the plaintiffs, as it was needed, the sum of $100,000, which they were to invest in the hog product, at the rate of 80 per cent. of the money so advanced, and 20 per cent. of the money put in to the purchase by plaintiffs. Defendants were to have interest on the money at the rate of 10 per cent. per annum. The product was to be shipped to them for sale, and they were to have 2½ per cent. commission on the amount, if sold within sixty days, and 1 per cent. commission for every thirty days it was carried thereafter. The contract gave to plaintiffs the right to sell for themselves without sending to defendants; but the latter were to have their commission all the same. When the product had all been sold out and an account rendered, a balance was found to be due defendants, for which they brought this suit and recovered a judgment of $7,054.48.

It appears by the bill of exceptions that this was mainly, if not wholly, made up of the commissions charged on sales *not* made by defendants, of products which never came to their possession, and the recovery was resisted on the sole ground that these commissions were a device to cover usurious interest.

The charge of the court to the jury on this point was to the effect that the transaction was not necessarily usurious; that defendants being engaged in the commission business, which required the use of money, might loan their money at lawful rates of interest to such parties and on such terms that it would bring to them also the business which would grow out of the investment of it; that, if the contract was made only with the honest purpose of securing, in addition to interest, the profits incidental to handling the product as commission merchants, it was not usurious; that, on the other hand, such a contract might be used as a mere evasive device to cover usurious interest, and it left it to the jury to say, from all the circumstances, whether this were so.

There can be no question that, on the general doctrine as to the line which marks the division between an honest transaction and a usurious cover, the charge of the court was correct, and that it is in this class of cases the province of the jury in jury trials, and of the chancellor in suits of equity, to determine, on a full consideration of all other facts, whether it be the one or the other. But counsel for plaintiffs argue that, as to these commissions which defendants never earned by sale of the property or by handling it, and as to which they were put to no cost or inconvenience, there can be no other consideration but the use of the money, and they are necessarily usurious.

It must be confessed that the argument has much force. But we are of opinion that it is not so conclusive that the court ought to have held, as matter of law, that it was usury. It is to be considered that defendants were engaged in a business which was legitimate, and in which both custom and sound principle authorized the joint use of their money and their personal service, increased in value by their character for integrity and experience. To both these sources they looked for their profits, and they were necessarily united. It was a necessity of their trade, and it was lawful for them, while loaning their money at a specified rate of interest, to stipulate with the parties to whom it was loaned for the incidental advantages of acting as commission merchants for the sale of the property in which the money was to be invested by the borrower. They had the right also to require, as a condition of the loan, that it should be invested in such property as would require their services in selling and handling it. All this is admitted.

We see no reason why the parties could not go a step further and stipulate that, if for any reason operating in the interest of the borrower he should prefer to become his own broker or commission merchant, or to sell at home, he should pay the commission which the other had a right to contract for and receive. Like the port pilot, and other instances, they were ready and willing to perform. They had a place of business, clerks, and their own time and skill ready to devote to theplaintiff's business. In that business they had a large pecuniary interest. They had loaned their money

without requiring any other security than the obligation of the other party, except that which might arise from the property coming to their hands. To make this property a sufficient security, the contract required of the plaintiffs that they should invest in the same property $20 of their own money to every $80 borrowed of defendants. The relinquishment of this right to control the sale of the property was a good consideration for the commissions which they would have made, if they had sold it.

While it was possible to make such a transaction a mere cover for usury, it was at the same time possible that the contract was a fair one, in aid of defendants' business,—a business in which they were actually and largely engaged, and in which lending money was the mere incident and not the main pursuit. It was, therefore, properly left to the jury to say whether, under all the circumstances, it was or was not a usurious transaction, under instructions to which we can see no objection.

We do not think, the express reservation of ten per cent. interest makes the contract usurious, because the law of Maryland forbids more than six. The contract was quite as much an Illinois contract, where ten per cent. is lawful, as a Maryland contract, and the former is the law of the forum. The ruling of the court below was in accord with what this court had held in Andrews v. Pond, 13 Peters, 65. The judgment of the circuit court is affirmed.

CORPORATIONS — FRANCHISES NOT AFFECTING CORPORATE EXISTENCE MAY BE DISPUTED.

GRAND RAPIDS BRIDGE CO. v. PRANGE.

Supreme Court of Michigan, January Term, 1877.

HON. T. M. COOLEY, Chief Justice.
" J. V. CAMPBELL, } Associate Justices.
" ISAAC MARSTON, }
" B. F. GRAVES, }

1. TOLLS.—A toll-bridge corporation, organized for thirty years, was duly authorized to exact tolls for twenty. *Held*, that, notwithstanding the continued existence of the corporation, no passenger was bound to pay after the twenty years had expired.

2. LIMITATIONS ON TAKING TOLL.—A board of supervisors had statutory power to prescribe the period for which a bridge corporation might take toll. *Held*, that its authority to limit that period was as great after as before the organization of the company.

3. RIGHT OF PRIVATE PERSON TO ATTACK SUBSIDIARY CORPORATE FRANCHISES.—The existence of a corporation is independent of annexed franchises, and not affected by their surrender or forfeiture. And although an individual may not dispute corporate existence, nor in a private action take advantage, collaterally, of the forfeiture of that franchise, he may yet question distinct and subordinate annexed franchises.

4. FORFEITURE OF FRANCHISES.—Any one of the distinct annexed franchises of a corporation may be forfeited without disturbing the rest or affecting the corporate existence.

5. WAIVER—EXPIRED FRANCHISES.—A waiver can not renew an estate that has expired by limitation. And where a corporation's right to a special franchise is limited to a certain period, it expires with that period, and the fact that the corporation continues to exercise it without interference from the state, neither continues nor restores it.

COOLEY, C. J., delivered the opinion of the court:

The present suit is one for the recovery of tolls for crossing the plaintiff's bridge, over the Grand river at Grand Rapids. The plaintiff is a corporation organized in 1851 for the period of thirty years. The purpose of the organization was to build the bridge in question; but as the river at this point was a navigable stream, the assent of the supervisors of the county was essential, before the bridge could be constructed. Comp. L. 1871, § 2649. The same board was also by law the competent authority to fix the tolls. The assent was given by resolution of the board, dated January 17, 1852, "to erect, rebuild, repair and keep up and use for the sole use and profit of said company a toll-bridge * * for the term of twenty years;" and the tolls were fixed at the same time. The bridge was duly constructed, and tolls collected of passengers for the term of this permission; but after the twenty years had expired, the defendant refused any longer to pay tolls, and passed over the bridge repeatedly without doing so. The plaintiff, claiming the right to continue to exact tolls according to the established rates, has brought this suit.

The questions which have been argued are exclusively questions of law.

1. It is first claimed that, as the law authorized the organization of the corporation for the purpose of constructing the bridge, subject only to the assent of the supervisors, but with a corporate life extending to thirty years, the assent of the board to the construction was in law, of necessity, an assent for the full period of thirty years, and could not be restricted by the board to any shorter term. We are referred to no authority which countenances this view, and we think it not maintainable. If the statute, under which the company had been organized, had contemplated the necessary existence of the company for the purposes of its organization for the full period of thirty years, and there had been apparent in it a policy that the franchise of taking tolls should be one of that duration, the argument would have had some force; but the statute expressly permitted corporations to be organized for any period not exceeding thirty years, and a bridge company for five years is as much within the policy of the statute as one for thirty. Had the plaintiff been organized for twenty years only, the question here considered could scarcely have been raised, and it can not be doubted that the board might, in advance, have negotiated with the parties proposing to form a corporation, and required of them, as a condition of assent to the building of the bridge, that the corporate life should be limited to any number of years specified. There might be reasons in the growing business of the place and of the river, which would seem to require such a limitation; and the authority conferred upon the local board to give or withhold assent would lose very much of its value, if it were confined within unvarying limits. It is not unreasonable to suppose that consent might sometimes be withheld under such circumstances, when otherwise it would not be.

But if the supervisors could bargain for a limitation of time before the corporate organization, so they could afterwards. The plaintiff, by the organization, only acquired corporate powers; it gained nothing that was originally within the control of the supervisors. That board was bound by nothing that so far had been done. The members of the board may not, in any manner, have become aware of the steps to organize, until application was made to them for permission to construct the bridge, and they were at liberty to act on such public considerations as were there presented, and with no more concession of privilege than they supposed the public interest to require. They might have consented for five years, having a future board at the end of that time to consent or refuse to consent, according as the public good would appear to be consulted by the one course or by the other. On this part of the case there does not appear to us to be any serious question.

2. It is next insisted on the part of the plaintiff, that the corporate powers which it claims, and which the state does not contest and inquire into by proceedings in the nature of a *quo warranto*, can not be attacked in this collateral way, and contested in a private suit. And this point, as we understand it, is the one principally relied upon.

It is certainly true that, in many cases, where a body of persons are found to be exercising corporate powers under color of law, and with the implied acquiescence of the sovereignty, an individual has not been allowed to dispute the corporate existence. It is held in those cases, and, as we think, very properly and justly, that the question, whether a franchise claimed under a sovereign grant is or is not rightfully exercised under such circumstances, should be left to be raised by the state itself in a direct proceeding for the purpose. The case of Smith v. Sheeley, 12 Wall. 358, lays down very satisfactory doctrine on this subject, and the views there expressed are in harmony with those declared by this court in Swartwout v. The Michigan and Air Line R. R. Co., 24 Mich. 389.

It is also true that, in cases almost innumerable, it has been decided that the forfeiture of a corporate franchise can not be collaterally taken advantage of in a private action. The doctrine is as old as the year-books, and at this late day one would scarcely be listened to who should venture to question it. We shall not assume that it is in any manner open to controversy.

But the question here in issue is not a question of corporate existence, nor a question of forfeiture. The defence may be perfectly valid and still the corporate existence be untouched. The corporation was brought into existence by the original organization, and existed, before the franchise of taking tolls accrued to it, by the action of the board of supervisors. That franchise was an additional privilege to those which the organization gave; it was in the nature of a grant, which the organization only clothed the corporation with—the capacity to receive. The grant may cease and the corporate existence remain untouched. It is said in Viner (Prerogative, etc., Y., c. 19) that "the franchise, etc., of a body politic may be seized or surrendered, etc., and the body itself remain untouched, as appears in the Bishop of Norwich's case, and more clearly in the same case after in Jones, Fulchard and Haywood's case; for franchises, etc., are not essential to a corporation, but a privilege pertaining to it." That is to say, the franchise to be a corporation may exist and remain, though any particular franchise annexed to it may have been surrendered or forfeited. To question the existence of such annexed franchise does not therefore of necessity question the existence of the corporation.

But it has been intimated in several cases that, where a corporation is brought to an end by lapse of time, any further exercise of corporate powers may be questioned collaterally. People v. Manhattan Co., 9 Wend. 351, 382, per Sutherland, J.; Morgan v. Lawrenceburgh Ins. Co., 3 Ind. 285, per Blackford, J.; Wilson v. Tesson, 12 Ind. 285, per Perkins, J. The limitations upon this doctrine we do not care to discuss, nor do we need to consider the doctrine advanced by Judge Cowen in People v. Bristol, etc., Turnpike Co., 23 Wend. 222, 243, that, when the people proceed against a corporation for a cause of forfeiture of the right to take toll, all the corporate franchises should be forfeited. The learned judge, in the same case, cites authorities showing that such is not a necessary result. "A corporation," he says, "may be created with all the individual powers of such a body, power to elect officers, use a common seal, collect tolls, etc., being an entire and indivisible body of itself, a franchise which must stand or fall with any one of its powers (*vide* Palmer, 82); and after having been administered for many years, a particular franchise may be added. The latter being forfeited, there may then arise a question whether it be not so obviously distinct that it may be cut away by information, without impairing the main body. This, it seems, may be done. In Rex v. Gregory, 4 T. R. 240, 242, *n.* (*a*), Lord Mansfield said: "Every college is a corporation in itself; and altogether they form one corporation in the university in gross." In the City of London v. Vanacre, 12 Mod. 270, it appeared that long after the city had been incorporated, King John granted to it the Shirewick of Middlesex, etc., by letters patent. This was a distinct franchise, the neglect or abuse of which might result in a forfeiture of that alone; and the remarks of Holt, at p. 271, keep this idea in view. Again, in Sir James Smith's case, he is speaking of usurpation of a liberty, and he says there may be a seizure of a liberty which will not warrant either the seizure or dissolving of the corporation itself." *Ibid*, p. 238.

In this case, as we have already said, there is no question of forfeiture, but there is a question of the continual existence of the franchise to take tolls. That franchise was distinct from the corporate franchise, and came into existence by grant, not directly from the state, but from the local board. The estate of the corporation in it was expressly limited to twenty years, and when that period came to an end, the estate ceased also. There was no longer color of law for taking tolls; and the failure of the state to institute proceedings could no more continue the franchise or restore it to life, than the like failure in the case of one who should erect a gate across a common highway and levy like tolls. When the twenty years expired, the defendant had a right to refuse to pay any longer, and every other person had the like right. If all others acquiesced, their action could not bind the one who refused.

If it were necessary, attention might be called to one circumstance which distinguishes this case from others, in which acquiescence by the state has been held to be a waiver. In those cases the franchise acquiesced in was one proceeding from the state itself; in this case, the franchise disputed is one which only theoretically proceeds from the state. The board of supervisors confer it, and the board of supervisors are not the authority which, in the name of the people, could institute proceedings to question its existence. What difference, if any, this should make on a question of forfeiture, we do not undertake to say, as in this case it is of no moment. A waiver can not renew an estate which has expired by limitation.

The judgment must be reversed, and judgment entered for defendant, with costs of both courts.

REMOVAL OF CAUSES—MINING CLAIMS.

TRAFTON v. NOUGUES.

United States Circuit Court, District of California, February Term, 1877.

Before HON. LORENZO SAWYER, Circuit Judge.

1. WHAT SUITS MAY BE TRANSFERRED TO FEDERAL COURTS.—Only suits involving rights depending upon a disputed construction of the constitution or laws of the United States can be transferred from the state to the national courts under the clause, "arising under the constitution and laws of the United States," of section 2 of the Act to determine the jurisdiction of the United States courts, passed March 3, 1875. (18 Stat. 470).

2. JURISDICTION—MINING CLAIMS—Where the only questions to be litigated in suits to determine the right to mining claims, are as to what are the local laws, rules, regulations

and customs by which the rights of the parties are governed, and whether the parties have, in fact, conformed to such local laws and customs, the courts of the United States have no jurisdiction of the cases under the provisions of the act giving jurisdiction in suits "arising under the constitution and laws of the United States."

3. REQUISITES OF PETITION.—A petition for the transfer of a suit from a state to a national court on the ground that it arises under the constitution and laws of the United States must state the facts and indicate the questions arising thereon, which are claimed to give the national court jurisdiction, so that the court can determine for itself from the facts the question of jurisdiction.

4. WHEN CASE MUST BE REMANDED.—A petition which only states the opinion, or conclusion of the petitioner, that the case arises under the constitution and laws of the United States, is insufficient, and a suit transferred on such petition will be remanded to the state courts on the ground that it does not appear from the facts alleged either in the pleadings, or the petition asking a transfer, that the case is one arising under the constitution or laws of the United States, within the meaning of the act of Congress, of March 3, 1875.

SAWYER, Circuit Judge:

I have had no little difficulty in satisfactorily construing this act. In the broad sense claimed by some, nearly all cases relating to the title to lands would be swept into the national courts; for, in the new states, in every action of ejectment involving a question as to the real title, one party or the other goes back to a patent or other grant under the laws of the United States. Since the passage of the act of Congress of 1866, and subsequent acts upon the same subject, expressly declaring the public lands to be free and open to exploration and occupation for mining purposes, subject to the local laws, regulations and customs of miners; also, authorizing a sale and patent to parties establishing a right under such local laws, regulations and customs, it seems to be claimed on this broad principle that all suits relating to disputes about mining claims may be transferred to the national courts. But, clearly, the great majority of such cases only involve a litigation of precisely the same questions as were litigated in those classes of cases for the many years since the acquisition of California prior to the passage of those acts of Congress; and they turn upon no disputed construction of the constitution or the statutes of the United States. In fact, where a patent is authorized to be issued to the possessor under these acts in a contested case, the statute refers the parties to the ordinary tribunals of the country to determine under the local laws and customs, irrespective of the acts of Congress, which party is entitled to the mining claim, and the patent issues to the party so determined to have the right. The 420 Mining Company v. the Bullion Mining Company, 3 Sawyer. Thus the rights of the parties are determined by the laws, regulations and customs of the locality outside the acts of Congress, without any discussion or controversy as to the construction of those acts. Since some of this class of cases transferred to this court were retained, but with no little hesitation, the Supreme Court of the United States has decided several cases which afford a rule for the future, and which, it seems to me, exclude jurisdiction in many cases which the bar appears to have supposed could be transferred.

The case of McStay v. Friedman, 92 U. S. R. 724, was a case in which one of the parties relied, first, on the statute of limitations; second, on the title acquired through the city of San Francisco, under the well-known Van Ness Ordinance, and the act of the legislature confirming it. On a writ of error to the state court, it was sought to sustain jurisdiction of the United States Supreme Court, on the ground that the title derived through the city depended upon the act of Congress of 1866, 14, St. 4, granting the land to the city in trust for those who held under the ordinance of the city, state statutes, etc. The court says: "At the trial no *question was raised* as to the validity or operative effect of the act of Congress." * * * The city title was not drawn in question. The real controversy was as to the transfer of that title to the plaintiffs in error; and this did not depend upon the constitution, or any treaty statute of, or commission held or authority exercised under the United States." Romie v. Casanova, 91 U. S. R. 380, is a similar case. At the present term of the Supreme Court, in a case which was *actually transferred from the state court to this court*, under section 2 of the act of 1875, the same ruling was made. One party claimed certain lots in San Francisco, by virtue of possession in pursuance of the provisions of the Van Ness Ordinance and the statutes of the state and of the United States confirming said title, while the city claimed the same as being p part of the public squares reserved and set apart for public purposes in pursuance of the same ordinance and statutes. After the transfer a demurrer was interposed to the jurisdiction of this court, on the ground that it presented no question arising under the act of Congress, the rights of the parties depending upon the construction of the ordinances of the city and the state statutes alone. On the other hand, it was earnestly urged that it was necessary to construe the act of Congress, in order to find out who the beneficial grantee intended by the act of Congress was. The court, however, held that the act of Congress referred the question, as to who was entitled to the land, to the city ordinances and the statutes of the state upon the subject; and that their rights must be determined by a construction of those ordinances and statutes. The Supreme Court affirmed this ruling at the present term, thus holding that the same principle adopted in relation to the section provided for writs of error to the state courts, is also applicable to cases of transfer from the state to the national courts, under section 2 of the act of 1875; that is to say, that, unless there is some contest as to the construction of the act of Congress, there is no jurisdictional question in the case.

So with reference to mining claims, the act of Congress grants certain rights to those who discover, take up and work mining claims. But it refers the parties to the local law of the states and territories, and to the rules, regulations and customs of miners of the district where the mines are situated, for the measure of their rights. If a dispute arises, as in the cases referred to, the act of Congress refers the parties to the ordinary tribunals to determine it by the local laws and customs, and not by the act of Congress. Upon the trial of the rights to a mining claim, precisely the same questions are tried, and they are determined by the same laws and customs that were invoked as the measure of the rights of the parties before the act of Congress had been passed. Clearly, the great mass of these cases can not involve the discussion or any dispute as to the construction of any act of Congress; and when they do not, under the decisions cited, this Court is without jurisdiction so far as this provision of the act is concerned. Where the controversy is upon matters other than the consideration of the constitution or an act of Congress, the "correct decision" of *such controversy* can not possibly "*depend upon the right construction of either.*" No controversy can possibly arise under the constitution or an act of Congress, when all parties agree as to its construction. There may be a contest as to other matters, but not as to the constitution or laws in such cases.

This action was brought in the state court in Placer County, to recover for trespass upon a gravel gold mining claim, and seeking an injunction restraining the working of the claim by the defendant. There is no

fact alleged, either in the complaint or the petition for transfer, indicating that there is any question involved other than those that usually arise in the trial of a right to a mining claim. And it affirmatively appears from the views stated in the petition that such are in fact the questions to be tried. It is alleged in the petition, it is true, that defendant located and held his claim under the several acts of Congress relating to the subject. But this is no more than can be said, in a general sense, of all mining claims since the passage of the several acts referred to. But, as we have seen, that does not necessarily, nor even ordinarily, in this class of cases, involve any question of disputed construction of the act, or any right or question which is not to be determined by the local laws, rules and customs, without reference to the acts of Congress, precisely as they were before there was any such act in existence.

The only other allegation is, that the "right to said mining ground by plaintiff depends upon the laws of Congress, and the right or title of defendant to said mining ground aforesaid must also be determined by the acts of Congress under which defendant and petitioner claim title; and that the rights of the plaintiff as against defendant must be determined under the laws of Congress of the United States." This is in substance two or three times repeated; but it is only the statement of a legal conclusion rather than a fact; and a conclusion manifestly founded upon the general idea that all mining claims are so held, that an action relating thereto, involving the rights of the parties to the mine, necessarily arises under the acts of Congress within the meaning of the act giving jurisdiction to this court—an erroneous conclusion, if I am right in the views before expressed. These allegations express merely the opinion of the petitioner that a jurisdictional question will arise. In my judgment such averments are insufficient to justify a transfer, or retaining the case when brought here. The precise facts should be stated, out of which it is supposed the jurisdictional question will arise; and what the question is, and how it will arise, should be pointed out, so that the court can determine for itself whether the case is a proper one for consideration in the national courts. Otherwise the administration of justice will be greatly obstructed, and intolerable inconvenience be the result. Under the fifth section of the act, it is made the imperative duty of the court *at any stage of the proceedings*, when it appears that "such suit does not *really* and *substantially* involve a *dispute* or *controversy* properly within its jurisdiction," to stop the proceeding and remand the cause. Where a suit presents no disputed construction of an act of Congress—where there is no contest at all as to what the act means, or what right it gives—where the only questions are as to what are the local mining laws, rules and customs, and as to whether the parties have in fact performed the acts required by such local laws, rules and customs—how can it be said, in any just sense, that such a suit "*really* and *substantially* involves a *dispute* or *controversy*" arising under an act of Congress? The location of the mine involved in the case is more than one hundred and fifty miles from San Francisco, where the court is held, and many other cases may arise in this state, Nevada and Oregon, in regard to claims lying from three to five hundred miles distant from the places where the national courts are held, and between which places the means of communication are by no means easy or cheap. Generally, in this class of cases the testimony rests mainly in parol, and there is a multitude of witnesses. The expense of prosecuting or defending such suits, at a large distance from the location of the mines, would be enormous. If the court should accept a petition containing a bare statement of the opinion of the petitioner, that the rights of the parties are derived under an act of Congress, as in this case, the result in most cases would be that the court would not be able to determine whether the case "really and substantially involves a dispute or controversy properly within the jurisdiction of the court," until the close of the testimony, when it would be necessary to remand the cause at last. Such results would largely obstruct the due administration of justice, and work an intolerable inconvenience to honest suitors. Besides, it would encourage transfers of cases, over which the court has no jurisdiction, by unscrupulous parties, for the very purpose of deterring the adverse party from pursuing his rights, by reason of the delays, inconvenience and enormous expense of prosecuting an action of this class at a great distance from home. These difficulties would be especially onerous in cases relating to mining rights, where time is often as important as the right, in the several large states of the Pacific Coast and interior of the continent, and where a court is held at but one point. A single state, in some instances, it must not be forgotten, contains more territory than all the Middle and New England states together.

In view of these, in my judgment, weighty considerations, therefore, I think it of the highest importance to the rights of honest litigants, and to the due and speedy administration of justice, that a petition for transfer should state the exact facts and distinctly point out what the question is, and how and where it will arise, which gives jurisdiction to the court, so that the court can determine for itself from the facts, whether the suit does really and substantially involve a dispute or controversy properly within its jurisdiction.

Whenever, therefore, the record fails to distinctly show such facts in a case transferred to this court, it will be returned to the state court, and under the authority given by section five, at the cost of the party transferring it. If I am wrong in my construction of the act, and of the recent decisions of the Supreme Court, the statute (section five) happily affords a speedy remedy by writ of error, upon which this decision and the order remanding the case may be reviewed without waiting for a trial, and the question may as well be set at rest in this case as in any other. It is of the utmost importance that a final decision of the question be had as soon as possible. If counsel desire, I will order the clerk to delay returning the case, till they have an opportunity to sue out and perfect a writ of error.

Let an order be entered returning the case to the state court from whence it came, with costs against the party at whose instance it was brought here.

SPLITTING CAUSE OF ACTION—PART OF A CHOSE IN ACTION NOT ASSIGNABLE.

BURNETT v. CRANDELL *ET AL.*

Supreme Court of Missouri, October Term, 1876.

HON. T. C. SHERWOOD, Chief Justice.
" W. B. NAPTON, " WARWICK HOUGH, " E. H. NORTON, " JOHN W. HENRY, } Associate Justices.

1. ASSIGNMENT OF HALF OF JUDGMENT—CONSENT OF DEBTOR—COLLECTION.—The assignment of one-half of a judgment, without the consent of the judgment-debtor, will not authorize the assignee to collect by execution the portion assigned.

2. POWER OF DEBTOR.—The debtor not consenting to such assignment, although he knows of it, and it be of record, may satisfy or compromise the entire judgment with the assignor.

3. EFFECT OF CONTEMPORANEOUS AGREEMENT TO SAVE CREDITOR HARMLESS.—An agreement, contemporaneous

with the compromise and satisfaction that the debtor should save the creditor harmless from the claim of the assignee, is not equivalent to a consent to the previous assignment.

4. WHEN ASSIGNMENT WILL BE ENJOINED.—And after such compromise and satisfaction, notwithstanding such knowledge, record and contemporaneous agreement, the assignee on application of the judgment-debtor will be enjoined from collecting by execution the moiety assigned.

ERROR to Jackson Circuit Court.

SHERWOOD, C. J., delivered the opinion of the court:

The record discloses that, in January, 1871, a judgment by default for the sum of $500 was rendered in the Kansas City Court of Common Pleas, in favor of one John Geis, and against William Burnett, in an action for an assault and battery. On the day of its rendition, Geis, by an instrument to that effect, assigned *one-half* of the judgment to the defendant Crandell, who was his attorney in the action referred to. After vainly endeavoring to set the judgment thus obtained aside, and of which, it seems, he had no knowledge until seeing an account of such recovery in the city papers, Burnett gave bond and took an appeal to the supreme court.

In the June following Geis made a formal assignment on the record to Crandell, in accordance with the items contained in the paper before mentioned. In the next succeeding July, Geis, for the sum of seventy dollars, "and for other good and valuable considerations," as recited in a paper to that effect signed by him, "settled with William Burnett the judgment in the above entitled cause (referring to the judgment already mentioned), and accepted and received the above sum in full satisfaction and discharge of the same." The paper in question also authorized the judgment to be "cancelled and dismissed at the cost of said William Burnett." At the time of this adjustment Geis received from Burnett a writing which, after reciting the settlement made by them, contains, in addition thereto, this clause:

"Now, this is to certify that I agree to protect and to indemnify and save harmless the said John Geis against all claims for damages which J. J. Crandell, the attorney of said Geis, may have against him on account of said settlement of said judgment."

Both the papers above mentioned contained, in their respective captions, a recital of the pendency of the appeal in the supreme court. Notwithstanding his agreement and receipt in full satisfaction, Geis (at whose instigation does not clearly appear) presented a transcript in the supreme court, and had the judgment affirmed. This occurred in July, 1872. Shortly thereafter, Crandell caused an execution to issue on the judgment thus affirmed, and made an indorsement on the writ as attorney and assignee requiring the sheriff to collect one-half the judgment for his use, and stating that the residue had been remitted and satisfied.

Thereupon Burnett filed his petition making Geis and the sheriff, Gray, defendants. Crandell was subsequently added as party defendant. Geis made no answer. A temporary injunction was granted; but, on final hearing, the restraining order was so far modified as to allow the collection of the amount claimed by Crandell. In consequence of this ruling the plaintiff has appealed.

The case at bar presents but two salient questions:

1. Whether it is permissible for a claimant or creditor to assign a portion of his claim or debt without the consent of the person against whom the claim is made or the debt asserted?

2. If the transfer of a moiety occur without such assent, whether it is competent for the original claimant to effect a compromise of the whole claim?

1. It is a familiar doctrine at law that a portion of a debt, claim or judgment, is incapable of assignment in the absence of the debtor's consent. This was so ruled in this court in Love v. Fairfield, 13 Mo. 300, under circumstances very similar to those now before us. It is true, that was a case which arose on a motion filed by the attorneys of the plaintiff, who were also assignees of a portion of the judgment, to set aside the entry of satisfaction made on the execution under the plaintiff's instructions, and to award another execution; but it is difficult to see why the same principle should not dominate, even where equitable interposition is invoked. For it must, it would seem, be obvious that the mischief incident to these partial assignments, these unauthorized divisions of a single debt into numerous and disconnected fractions, would be as great, and therefore the prohibitory reasons of equal cogency in a court of equity as in a court of law. This, for the most part, was the view taken in the case of Mandeville v. Welch, 5 Wheat. 277, on which the decision in our own court already referred to was chiefly based. The doctrine here asserted has also found direct recognition in courts possessing chancery powers. Collyer v. Fallon, 1 Turn. & Russ. 470, 475, 476; Gibson v. Finley, 4 Md. Chy. 75.

The learned judge and accomplished author who delivered the opinion in Mandeville v. Welch, *supra*, would seem to have expressed a somewhat different view in his admirable work on Equity Jurisprudence (Sto. Eq. Jur., vol. 2 §, 1044); but it will perhaps be found, on close examination of the authorities cited in the margin in support of the text, that they scarcely give sanction in all its broadness to the idea that a creditor, in ruthless disregard of the wishes or interest of his debtor, may divide and assign the debt into as numerous portions *as there are dollars in the indebtedness*, and yet successfully appeal to *a court of conscience* to countenance and enforce such oppressive and inequitable transfers. For if you once grant the premise that a creditor, without the consent of the debtor, may split and assign the debt into *two* portions, you thereby pave the way for the inevitable corollary that no bounds can be fixed or limits assigned in this regard to the *creditor's gracious option*. The mind of every just man might well hesitate before adhering to such a doctrine, however sustained by precedent or fortified by authority. But, as before intimated, it is not thought to be thus sustained by the authorities, to which reference has been made as cited in a note appended to the text. The case of Lett v. Morris, 4 Sim. V. C. 607, was more in the nature of *an appropriation out of a particular fund than the assignment of a portion of a debt*. In addition to that, Morris, on whom the order was drawn by his builder, Greenaway, received without objection a duplicate of this order on the day it was drawn, and subsequently paid one of the instalments ($80) to Greenaway, who immediately paid it over to Lett, who had been previously notified to be present by a letter from Bray, the architect of Morris. And then after that, the second instalment was paid by Morris himself directly to Lett's clerk. It is true that Morris, in his answer, denied Bray's authority to write the letter, and denied that both the installments were paid to Greenaway, but the case says: "*It appeared by the evidence that those two sums were paid as before stated.*" Now it would have been a palpable fraud on Lett to have allowed Morris to seemingly approve the order on which he knew the former relied as security for the lumber he was furnishing, and then in the end repudiate the appropriation to which he had impliedly, if not expressly, assented, and on the faith of which the material was furnished. Most clearly, he was equitably estopped from urging the defence that he had not consented to the appropriation.

In Smith v. Everett, 4 Bro. Ch. 64, the order of Maton, who was a government contractor, was held to

constitute a specific lien on and appropriation of the particular fund on which it was drawn, in favor of certain sub-contractors, because they had contracted to furnish and did furnish supplies to certain encampments on the faith of and with reference to an articled stipulation, whereby Everett to whom the order was directed, and who was one of the sureties of Maton for the performance of his contract to the government, was to have the disbursement of all the moneys paid by the government on the contract. And so Lord Commissioner Eyre well remarks: "As Everett was Maton's security, it was provided that the money should be paid to the sub-contractors by him, and he had the bills in order to draw upon government. There could not be a stronger appropriation of the fund than this." And Lord Commissioner Ashhurst distinctly says: "This is not a *debt*, but a standing authority to Everett to give the other parties (meaning the sub-contractors) the same remedy." So that it will be readily observed, that not only was there the element of equitable estoppel in that case also, but Everett had *previously* stipulated to do the very thing which Maton's order requested him to do. The case of Watson v. the Duke of Wellington simply decides that, to create an equitable assignment, there must be an engagement on the part of the *debtor* to pay out of a particular fund. The case of Morton v. Naylor, 1 Hill (N. Y.), 583, was one at law, and merely establishes that, when a landlord draws on his tenant for a certain sum and the latter accepts, it is not within the power of the former to revoke the order so given.

I have thus briefly reviewed the cases on which the doctrine laid down in the text is supposed to rest, but find none of them to go to the extent there claimed. And since the evidence shows, in the most pronounced manner, that Burnett never consented to the assignment made by Geis, it must follow, if the foregoing reasoning be correct, that whatever equities may have arisen or rights been created, as between Geis and Crandell, such rights and equities can not be regarded as having any obligatory force on Burnett. Nor can the agreement of the latter, made when effecting the compromise with Geis, be tortured into such assent. He, well knowing that no consent on his part had been given to the assignment of half of the judgment, might well conclude that he ran no risk in agreeing to indemnify Geis for making a compromise, which he had the perfect right to effect as owner of that judgment. And the intention of Burnett in this respect is made more pointedly apparent, when it is remembered that the contemporaneous agreement of Geis recites that the judgment is "to be *canceled and dismissed" at the cost of Burnett.* Surely, no reasonable inference of intended recognition of the rights of a partial assignee in a judgment is to be drawn from a compromise which contemplates the practical obliteration of such judgment.

2. This brings us to the second point proposed for examination. And in relation to this we regard the case of Kendall v. United States, 7 Wall. 113, as conclusive authority on that point; for Mr. Justice Miller, when speaking of a claim of certain attorneys against the United States, where a claim of the Cherokee Indians, of which the attorneys were to receive directly from the United States five per cent. on all sums that might be collected on the claim, was compromised by treaty, says: "It is supposed that the doctrine of an equitable assignment of a debt or fund due from one person to another, by the order of the creditor to pay it to a third party, when brought to the notice of the debtor, is a sufficient foundation for the claim. * * * The debt or fund as to which such an equitable assignment can be made must be some recognized or definite fund or debt in the hands of a person who admits the obligation to pay the assignor, or at least it must be some liquidated demand capable of being enforced in a court of justice. We apprehend that the doctrine has never been held, that a claim of no fixed amount, nor time, or mode of payment—a claim which has never received the assent of the person against whom it is asserted, and which remains to be settled by negotiation or suit at law—can be so assigned as to give the assignee an equitable right to prevent the original parties from compromising or adjusting the claim on any terms that may suit them."

Here "the obligation to pay the assignor" had never been admitted; nor was the judgment, at the time the compromise was effected, a "liquidated demand capable of being enforced in a court of justice;" for the bond was given, appeal taken and cause pending in this court. What might have been the ultimate result of such appeal, it is impossible now to determine, and therefore the whole matter was manifestly one remaining to be settled "by *negotiation or suit at law.*" This shows very plainly that this case falls within the principle of the rule laid down by Mr. Justice Miller, and consequently fully authorizes and gives validity to the compromise which Geis, without Crandell's consent, effected. So that, should it be urged that our conclusion as to the first point considered was incorrect, still our second conclusion, supported as it is by high authority, remains intact.

The result is, that the judgment must be reversed and the cause remanded, with directions to proceed in accordance with this opinion. All concur.

NOTE.—The first position in the foregoing opinion seems to have been taken by Judge Sherwood with some hesitation; but, we believe, with few exceptions, he is supported by all the decisions. Judge Story, who delivered the opinion in Mandeville v. Welch, cited in the principal case, afterwards affirms the doctrine there declared. Shankland v. Corporation of Washington, 5 Pet. 394. So, in Ingraham v. Hall, 11 Serg. & R. 78, the supreme court of Pennsylvania held that a party can not, by assigning a part of his claim to another, divide an entire cause of action, nor by any means sustain more than one suit for it; and, if two suits be brought, a recovery in the first for one part is a bar to an action for the other part. In Massachusetts the same position is taken in an elaborate opinion by Judge Shaw in Palmer v. Merrill, 6 Cush. 282. This was an action on an order given by the assured in a life policy on the insurance company, to pay the plaintiff a *certain portion* of the amount insured, and it was held that an assignment of a chose in action vests in the assignee an equitable interest; but, in order to constitute such an assignment, "the transfer should be of the whole and entire debt or obligation in which the chose in action consists, and, as far as practicable, place the assignee in the condition of the assignor, so as to recover the whole debt due, and to give a good and valid discharge to the party liable." Says the distinguished judge: "We do not question that an assignment may be of an entire fund in the form of an order drawn by the owner on the holder of the fund or party indebted, with authority to receive the money or discharge the debt; but, if it be *for a part only* of the fund or debt, it is a draft or bill of exchange, which does not bind the drawee or transfer any *proprietary* or *equitable* interest in the fund, until accepted by the drawee; it therefore creates no lien upon the fund." The supreme court of California, in Marziou v. Pioche, 8 Cal. 536, held, the creditor has no right to assign the debt in parcels, and thus, by splitting up the cause of action, subject his debtor to the costs and expenses of more suits than the parties originally contemplated. And afterwards, in Wheatley v. Strobe *et al.*, 12 Cal. 97, Judge Field held that a bill of exchange, not accepted, can not operate as an equitable assignment of the fund against which it is drawn, unless it is drawn for the full amount of the fund, so that there may not be any splitting of the amount due into distinct causes of action. So, in Dwight v. Pease *et al.*, 3 McLean, 94, it was *held*, 1, that a promissory note given to two or more payees, who are not in partnership, must be assigned by all of them; 2, that an assignment by one of two payees at most can convey but one-half of the interest in the note; 3, that this does not enable the assignee to sue the drawer; that a note can not thus be cut up, and suits against the drawer multiplied.

The same general doctrine is maintained in the following: 1 Salk. 638; Farrington v. Payne, 15 Johns. 432; Smith v. Jones, *Ib.* 229; Colvin v. Corwin, 15 Wend. 557; Miller v. Covert, 1 Wend. 487; Coster v. N. Y. & Erie R. Co., 6 Duer, 46; Bowdoin v. Coleman, 3 Abb. 431; Freeman on Judgments, § 241; Secor v. Sturgis, 16 N. Y. 58. *Contra*, in Field v. Mayor of New York, 6 N. Y. 179, where a person, having a demand due him, assigns part of it to different persons, to secure the payment to them of specific sums in succession, it was *held*, a court of equity had jurisdiction of a suit by one of the assignees to collect his part of the demand, without making the other assignees parties to the proceedings. It was further held that payment by the debtor of his debt to the original creditor, after notice that a part of the debt has been assigned, constitutes no defense to a suit brought by the assignee of such part. See also Poor v. Guilford, 10 N. Y. 273. After the decision in Field v. Mayor of New York, the supreme court of New York, in Cook v. Genesee Mut. Ins. Co., 8 How. Pr. 514, held that, while a court of equity would entertain an action to recover a part of a debt assigned, yet in such action it was necessary that the other assignees or holders of the entire debt must be brought in as parties.

ACTION FOR DAMAGES CAUSED BY SALE OF INTOXICATING LIQUOR.

KRACH *ET AL.* v. HEILMAN.

Supreme Court of Indiana, January Term, 1877.

HON. JAMES L. WORDEN, Chief Justice.
" HORACE P. BIDDLE,
" GEORGE V. HOWK,
" SAMUEL E. PERKINS,
" WILLIAM E. NIBLACK,
Associate Justices.

1. STATUTE CONSTRUED—PLEADING—The act of Feb. 27, 1873, providing that any one taking care of an intoxicated person may recover a reasonable compensation from the parties causing such intoxication for every day spent in such service, must be construed to authorize such recovery only during the time such person may remain intoxicated; and where the complaint alleged that the plaintiff was compelled to nurse and take care of a person for three months, on account of injuries received while in a state of intoxication, the case is not brought within the eighth section of the statute, because it does not show that the intoxication continued during that time or any part of it.

2. DAMAGES—IMMEDIATE AND REMOTE CAUSE OF INJURIES.—The twelfth section of the above act provides that any person who shall be injured in person, property or means of support, in consequence of the intoxication of any person, shall have a right of action against the party causing such intoxication. *Held*, that, where a husband became grossly intoxicated, and while being hauled home in his wagon, received injuries by means of a barrel of salt falling upon him, from which injuries he died, his widow had no right of action under this statute, because the immediate cause of the injury to the plaintiff was the death of the deceased, and his intoxication only the remote cause. *Held*, that a person is answerable for the consequences of his fault only so far as they naturally result from it and may therefore be foreseen; and that in this case the parties selling the liquor could not have anticipated that, on his way home, the intoxicated man would be fatally injured by the salt barrel.

APPEAL from the Vanderburg Civil Circuit Court.

WORDEN, C. J., delivered the opinion of the court:

Complaint by the appellee against the appellants, in two paragraphs. Demurrer to each paragraph, for want of sufficient facts, overruled, and exception. Issue, trial by jury, verdict and judgment for plaintiff.

The complaint is as follows: "Catharine Heilman complains of John Krach and Christian Stock, and says that, on the 1st day of December, 1873, the said John Krach obtained a permit in due form of law, to retail spirituous and intoxicating liquors in quantities less than a quart, for one year from that date, at his store, situated on the Petersburg road in Scott township in the county of Vanderburg, State of Indiana, about eight miles from the city of Evansville, and from that day to the present time he has been, and still is, engaged in that business. The plaintiff further avers that Edward Heilman, late of Warrick county, was for many, to wit, twelve years next previous to his decease, as hereinafter described, the husband of the plaintiff, and that during all that time they lived together as husband and wife, and that they became the parents of seven children, the fruit of their marriage; that he was a farmer by occupation, and lived on a small farm in said county of Warrick, and that the plaintiff and the said children were dependent upon the said husband and father for their support; that he was an affectionate husband, a kind father and a good citizen, and had always been of sober habits, which the defendant well knows. The plaintiff further avers that, on the 31st day of December aforesaid, the said Edward Heilman was in full life and good health, and about thirty-five years of age, and was living happily on his farm with his family; that on the said day he was traveling on his return home from the city of Evansville (to which he had, on that day, been with his wagon and two-horse team), and, on the evening of that day, he stopped at the store of the said defendant John Krach, of whom the said Edward bought intoxicating drink, to wit, peach brandy in small quantities called drinks, in all amounting to one pint, which the said Edward then and there drank in the store of the said Krach, and that the said defendant, Christian Stock, being then and there present, sold to the said Edward a certain quantity of other intoxicating drink, to wit, whiskey in small quantities, called drinks, in all amounting to two gills, which the said Edward then and there drank, the said Stock then and there drinking with the said Edward; that the said defendants, in selling the said liquors to the said Edward, were then and there acting in concert, and with the design and intention of making him drunk, by means whereof the said Edward became and was drunk, so that he was not able to walk, stand or sit, and in consequence of which drunkenness he was laid in his wagon, and hauled in that drunken condition, in the night of the said day, to his own home, his team having been driven by one of his neighbors, who himself was in a state of intoxication, which the defendants then and there well knew. The plaintiff further avers that, while the said Edward was lying in his wagon in that drunken condition, and while being driven to his home as aforesaid, he was severely and fatally injured by means of a barrel filled with salt in the same wagon, which fell over and struck the face and head of the said Edward with great force and violence, by means of which his face was frightfully cut and wounded, and his scalp bruised and his skull fractured; and he was also greatly injured in other parts of his body, to wit, his shoulders, back and sides, while being so driven and hauled, which were also greatly bruised and wounded by the motion of the said wagon; that all of said injuries, wounds, cuts and bruises were made while the said Edward was in his drunken and helpless condition, and within a short time, to wit, one hour, after he left the store and premises of the defendant Krach, as aforesaid. And the plaintiff further avers that the said fit of drunkenness was caused by the said intoxicating liquors, so sold by the said Krach and the said Stock to the said Edward Heilman, and drunk by him as aforesaid. The plaintiff further avers that the said Edward would not have been injured, wounded, cut and bruised but for the drunken and helpless condition aforesaid; and she further avers that, on the night of said day, he was brought to his home and family in the state of drunkenness and with

the injuries and wounds already above described, and that, by means of said drunkenness, and from the effects of said injuries, the said Edward became sick, lame and diseased, and so continued lingering in pain and sickness until the 13th day of March, 1874, when he departed this life in consequence of the injuries aforesaid, to the plaintiff's damage of $5,000, for which she prays judgment."

Second Paragraph: "The said plaintiff, further complaining of the said defendant, says that the said John Krach, on the 1st day of December, 1873, obtained a permit from the board of commissioners of the county of Vanderburg to retail intoxicating liquors, and henceforth has been engaged in retailing said liquors. And plaintiff says she was, on the 31st day of December, 1873, the wife of one Edward Heilman, and so remained until his death, and is now his widow; that said Edward Heilman, at the time of the happening of the injuries hereinafter set out, was a man of sober and temperate habits, and was not used to drink intoxicating liquors; yet the said defendants, on the 31st day of December, 1873, combined and confederated together to make said Edward Heilman drunk, and to that end said defendants pressed him to buy intoxicating liquors at the store of said Krach, and said defendants did then and there sell to said Heilman large quantities of peach brandy, whiskey and other intoxicating liquors, and induced him, by their persuasion, to buy and drink the same, which having done, the said Heilman became and was drunk, and entirely unable to take care of himself, and the said defendants put the said Heilman in his wagon, he being drunk and insensible, and procured another person, who was also drunk and was utterly incapacitated to take care of a drunken man, to drive said wagon to the home of said Heilman, distant four miles from said store; that defendant laid said Heilman in said wagon on his back, and placed a log of wood under his head, and directed said other person to haul him to his home; that, while so being hauled, and being utterly unconscious, a hoop of a barrel, which was then in said wagon, becoming unloosened from said barrel, impinged in and upon the head of said Heilman and entered the same behind one of his ears, and worked gradually into his head and continued to lacerate, tear and penetrate his head, until he was taken from said wagon, being a period of one hour, thereby making a large and dangerous wound and hole in the head of said Edward Heilman, from which injuries so received said Edward Heilman died, after languishing in great pain for a period of three months; and plaintiff says that she was compelled to nurse, take care of and attend to said Heilman during that time, and that her services in that regard were worth $500; that she had no means of support, except the labor of her said husband; that he was accustomed to and did labor on a farm, in order to support the plaintiff and their children, being seven in number; and that, by the death of her said husband, she has been damaged in the means of support in the sum of $3,500, and that said sums of money are still due and unpaid; wherefore she asks judgment for $5,000."

Error is assigned upon the ruling of the court upon the demurrer to each paragraph of the complaint, and we proceed to consider the questions thus raised.

The common law does not, on the facts alleged, give the plaintiff any right of action. Her right of action, if she have any, is based upon statute. The statute relied upon is the act of February 27, 1873, to regulate the sale of intoxicating liquors, etc. Acts 1873, Reg. Sess., p. 151. The eighth section of the act is as follows: "Any person or persons who shall, by the sale of intoxicating liquor, with or without permit, cause the intoxication, in whole or in part, of any other person, shall be liable for and be compelled to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person, for every day he or she is so cared for, which sum may be recovered in an action of debt before any court having competent jurisdiction." The twelfth section provides that, "in addition to the remedy and right of action provided for in section eight of this act, every husband, wife, child, parent, guardian, employer, or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her name, severally or jointly, against any person or persons who shall, by selling, bartering or giving away intoxicating liquors, have caused the intoxication, in whole or in part, of such person," etc.

The first paragraph of the complaint is not based at all upon the eighth section of the statute. Nor do we think the second paragraph makes out a case within that section. The section must be construed to authorize a recovery by a party, "who may take charge of and provide for such intoxicated person," only for the time during which such person may remain intoxicated. This is clearly implied from the language employed, and the nature and object of the provisions.

The allegation in the second paragraph, that for the period of three months, during which the deceased languished, the plaintiff was compelled to nurse and take care of him, does not bring the case within the eighth section; for it does not show that the intoxication continued during that time, or, indeed, any part thereof. Each paragraph, then, must stand or fall upon the provisions of the twelfth section. It can not, under the allegations, be claimed that the plaintiff was in any way injured by the intoxicated person; and it remains to inquire whether the allegations show that she was injured in person, or property, or means of support, "in consequence of the intoxication" of her now deceased husband.

The substance of the case, made by both paragraphs, is that the defendants furnished the deceased with intoxicating liquor until he became drunk and insensible and unable to take care of himself; that in going home, lying down in his wagon, in consequence of his intoxication, he received the injury from the barrel of salt, which injury he would not have received but for having been intoxicated, and from which injuries he died.

One of the objections made to the complaint, passing over others, is, in our judgment, fatal to both paragraphs. The rule of law is, that the immediate, and not the remote, cause of any event is regarded. We have seen that, if the plaintiff is entitled to recover, it is because she was injured "in consequence of the intoxication" of the deceased. The immediate cause of the injury to the plaintiff was the death of the deceased. The remote cause may have been his intoxication, which led to his injuries, which injuries, in their turn, led to his death. The plaintiff, therefore, was not immediately injured by the intoxication of the deceased. The rule of law above stated is well enough settled. The difficulty that usually arises is in its application. It is sometimes difficult to determine what is the remote, and what the proximate, cause of an event. But no difficulty of that sort arises in the present case. Here, according to the allegations, it is clear that the intoxication of the deceased was only the remote cause of the injury to the plaintiff, while his death was the immediate cause of such injury. For such injury, we think, on principle and well-considered authority, the statute does not render the defendants liable to the plaintiff. The case of Tisdale v. Inhabitants of Norton, 8 Metc. 388, is in point. Here the town was obliged to

repair the highway, and an action was given by statute to any person who might receive an injury by reason of any defect or want of repair. A gully had been washed out in the highway, rendering it impassable, and the plaintiff, in passing along with his conveyance, had to drive off the highway and into a pond in order to pursue his journey. In passing through the pond, the plaintiff's conveyance was overturned, and he was thrown into the pond, in consequence of a hole in the bottom thereof. It was held that the case did not come within the statute, and that the plaintiff was not entitled to recover. The case of Marble v. The City of Worcester, 4 Gray, 395, is also in point. The case arose under a statute similar to that involved in the previous case. There was a defect in the way, and a man, with a horse and sleigh, undertook to drive through that part of the way in which the defect existed. The sleigh pitched into a hole in the ice, which constituted the defect, and the horse, taking fright, ran, threw out the driver, detached himself from the sleigh, except the shafts or thills, and, having run some fifty rods, ran against the plaintiff, who was then in the highway, and injured him, for which the action was brought. It was held that the plaintiff was not entitled to recover, on the ground that, though the defect in the highway was the remote cause of the injury to the plaintiff, yet it was not the immediate cause, that being the collision between the horse and himself. Shaw, C. J., in delivering the opinion of the court, said: "The rule, *in jure causa proxima, non remota, spectatur*, is of very general application in the law; and, although more frequently stated and illustrated in the law of insurance, yet it is frequently applied to other cases of like kind. The whole doctrine of causation, considered in itself metaphysically, is of profound difficulty, even if it may not be said, of mystery. It was a maxim, we believe, of the schoolmen, *causa causantis causa est causati*. And this makes the chain of causation, by successive links, endless. And this perhaps, in a certain sense, is true. Perhaps no event can occur which may be considered as insulated and independent; every event is itself the effect of some cause, or combination of causes, and, in its turn, becomes the cause of many ensuing consequences more or less immediate or remote. The law, however, looks to a practical rule, adapted to the rights and duties of all persons in society in the common and ordinary concerns of actual life; and, on account of the difficulty in unraveling a combination of causes, and of tracing each result, as a matter of fact, to its true, real and efficient cause, the law has adopted the rule before stated, of regarding the proximate and not the remote cause of the occurrence which is the subject of injury."

In Crain v. Petrie, 6 Hill, 522, it was said by Nelson, C. J., delivering the opinion of the court, that, "to maintain a claim for special damages, they must appear to be the legal and natural consequences arising from the tort, and not from the wrongful act of a third person remotely induced thereby. In other words, the damages must proceed wholly and exclusively from the injury complained of." The principle here involved was much considered in the case of Ryan v. New York Central Railroad, 35 N. Y. 210, which we cite, withholding any opinion as to whether it was correctly applied in that case. The case of Fairbanks v. Kerr, 70 Penn. 86, is in point. It was there held that, "as a general rule, one is answerable for the consequences of his fault only so far as they are natural and proximate, and may therefore be seen by ordinary forecast; not for those arising from a complication of his fault with circumstances of an extraordinary nature."

The defendants, in causing the intoxication of the deceased, could not have anticipated that, on his way home, he would be fatally injured by the salt barrel. That was an extraordinary and fortuitous event, not naturally resulting from the intoxication. Suppose, by way of illustration, that a person, by reason of intoxication, lies down under a tree, and a storm blows a limb down upon him and kills him, or that lightning strikes the tree and kills him; could it be said, in a legal sense, that his death was caused by intoxication? In the chain of causation the intoxication may have been the remote cause of his death, because, if he had not been intoxicated, he would not have placed himself in that position, and therefore would not have been struck by the limb or lightning. In the case supposed it may be assumed as clear, that the parties causing the intoxication would not be liable under the statute to the widow, as for an injury to her caused by the intoxication of the deceased. Yet there is no substantial difference between the case supposed and the real case here. See, on the subject of remote and proximate causation, the case of Kelly v. The State of Indiana (at the present term*); also Durham v. Musselman, 2 Blackf. 96.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to sustain the demurrer to the complaint.

*This case will be reported in 53 Ind. 311.

BOOK NOTICES.

AUSTIN'S JURISPRUDENCE, CONDENSED BY ROBERT CAMPBELL, BARRISTER-AT-LAW. New York: Henry Holt & Co. 1876.

This admirable condensation of Austin's lectures contains substantially the matter comprehended within the two volumes of the original work, unabridged. It is avowedly written for the use of students. But—as students may, respecting a work of such a nature, be considered to include the inquisitive and studious practitioner—even in this form it is a proper and useful addition to the lawyer's library. While retaining the intrinsic value of the original, this edition is enriched by the notes and comments of Mr. Campbell. The labors of Mr. Campbell, as manifested in the work, have been quite successful. The ideas of Mr. Austin are presented with great clearness and brevity, making the book much more attractive than the original. It will prove what it was intended to be, just the thing for the student.

The importance of such a work in the *curriculum* of our law schools, and the place it should occupy in elementary instruction—remembering the innumerable books of reports, diverse statutes, and conflicting decisions, etc., extant—is thus stated in the language of the author: "To the student, who begins the study of the English [or American] law, without some previous knowledge of the *rationale* of law in general, it naturally appears an assemblage of arbitrary and unconnected rules. But, if he approached it with a well-grounded knowledge of the general principles of jurisprudence, and with the map of a body of law distinctly impressed upon his mind, he might obtain a clear conception of it (as a system or organic whole) with comparative ease and rapidity. With comparative ease and rapidity he might perceive the various relations of its various parts; the dependence of the minuter rules on its general principles, and the subordination of such of these principles as are less general or extensive, to such of them as are more general and run through the whole of its structure. In short, the preliminary study of the general principles of jurisprudence, and the mental habits which the study of these tends to engender, would enable him to acquire the principles of English [and American] jurispru-

dence in particular, far more speedily and accurately than he possibly could have acquired them in case he had begun the study of them without the preparative discipline. There is (I believe) a not unprevalent opinion that the study of the science whose uses I am endeavoring to demonstrate might tend to disqualify the student for the *practice* of the law, or to inspire him with an aversion to the practice of it. That some who have studied this science have conceived a disgust for practice, is not improbably a fact. But, in spite of the seeming experience in favor of the opinion in question, I deny that the study itself has the tendency which the opinion imputes to it. A well-grounded knowledge of the general principles of jurisprudence helps, as I have said, to a well-grounded knowledge of the principles of English jurisprudence; and a previous well-grounded knowledge of the principles of English jurisprudence can scarcely incapacitate the student for the acquisition of practical knowledge in the chambers of a conveyancer, pleader or draftsman. Armed with that previous knowledge, he seizes the *rationale* of the practice which he there witnesses and partakes in, with comparative ease and rapidity; and his acquisition of practical knowledge, and practical dexterity and readiness is much less irksome than it would be, in case it were merely empirical; insomuch that the study of the general principles of jurisprudence, instead of having any of the tendency which the opinion in question imputes to it, has a tendency (by ultimate consequence) to qualify for practice, and to lessen the natural repugnance with which it is regarded by beginners." pp. 156, 157. And it is shown that these views have been followed in Prussia, and have Savigny's support. (*Ibid.*) Of Prussia, it is said, that it is "a country whose administrators, for *practical skill*, are at least on a level with those of any country in Europe." (*Ibid.*) A statement undoubtedly correct. It is further said: "The opinion I have expressed was that of Hale, Mansfield and others (as evinced by their practice), and was recommended by Sir William Blackstone, more than a century ago." p. 158.

These views must, it would seem, be concurred in by all who have realized the benefits of such instruction, and, if opposed, can only be so, with any show of reason, by those who are personally interested. Of course, the consequence of following them out in all strictness, will be to require a longer period of probation than heretofore to those who may desire to become lawyers; but, thereby, those who become lawyers will be fewer and better qualified, and the history of American jurisprudence, at least, will not disclose so much ignorance, crudeness and sophistry as it, at the present time, does. The American law is certainly no easier to acquire properly than is the English or German; yet the course which the English or German aspirant has to go through is far more difficult and critical than that required in any state in the American Union.

The contents of the book are not, it is true, beyond criticism; but it is not intended that it alone should constitute the fountain from whence principles of law should or might be gleaned. The notion of morality it expounds is condemned by noted and able men, among which Mr. Lecky, author of the History of European Morals, may be especially noticed for his able, exhaustive and partially successful criticism. Dr. Stirling, the profound author of the "Secret of Hegel" and other works and essays, in the last of four lectures delivered to the Juridical Society, Edinburgh, in November, 1871, *inter alia* has this to say of Mr. Austin, as judged by his work; that, though a worthy gentleman, he "is one of those finical, over-refined, almost female minds that, without power in themselves, attach themselves blindly to the guidance of another or others; and his book is a work of infinite external verbal distinction, but it has not a vestige of internal thinking rationale." (The Philosophy of Law, p. 83; Soule, Thomas & Wentworth, St. Louis, Mo.. 1874.) This criticism, however, is somewhat pedagogical; it is too strong. It is even too severe for one who follows the system of Hegel, which Dr. Stirling, avowedly and manifestly, in the lectures alluded to, does. It ought not to be charged against Mr. Austin that he attached himself blindly to the guidance of others; there being much in the work that is original and profound. His distinction between law and morality is certainly more satisfactory to the practical mind, at the present day, than is Fichte's (Science of Rights), which Dr. Stirling would approve; and the system he has fashioned, and, unfortunately, only *partially* expounded, is far better fitted for practical requirements, even in universities, than is Fichte's or Hegel's. One who would attempt to acquire a practical proficiency in law would hardly be warranted in confining himself to Hegel or Fichte or Kant, and, if he did, would be in as bad a state when he finished his studies, as the chemist who would attempt to expound chemistry from the standpoint of transcendental idealism. A large portion of Mr. Austin's work, as far as completed, is devoted to the definition and explanation of terms, something which, although approved by the German philosopher, is hardly adhered to by him in practice. And the plan he had in contemplation would have gone far to clear away the inconsistencies and errors with which not only the American and English systems, but also the Continental systems, were and are pregnant. The fact is that Mr. Austin was of a different school of philosophers than Dr. Stirling, respecting the relative merits of which, respectively, the judgment of jurists, it appears, accords the more useful place to Austin and others of his school. It may be said that we can better dispense with Hegel's, Kant's or Fichte's exposition of law than Austin's; but, as it is not necessary to do so, neither need to be dispensed with.

The typography is exceptionally good in one respect, it shows fewer errors than is customary among American publications. The print, however, is too small; it is injurious to the eyes to read it. M. M. C.

RECENT LEGISLATION.

MISSOURI LEGISLATURE—SESSION OF 1877.

AN ACT entitled An Act to dispose of the records and unfinished business of Common Pleas Courts abolished under Section 42, Article 6 of the Constitution.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. All cases or suits at law or equity pending at the time of the expiration of the terms of office of the several judges of all courts now existing in this state, not named or provided for in the Constitution of this State, or abolished by said Constitution, and all of the business of said courts and records thereof, and papers thereto pertaining and within the control or custody of said courts, shall be transferred to the court or courts having jurisdiction thereof in the counties where said courts exist; and the courts to which said business, records, and papers are transferred, are hereby vested with full and entire jurisdiction thereof, and all writs, processes, complaints, petitions, libels, appeals, and proceedings which are made returnable or to be entered in any of said courts, which expire under the provisions of the forty-second section of article six of the Constitution of the State, shall be returnable to, entered, and have day in said court having jurisdiction thereof; and all judicial writs and processes and

copies founded upon the records of said courts expiring under the provisions of said section of the Constitution, shall issue under the seal of the court having jurisdiction thereof in like manner and with the same effect as the same might have issued by the courts from which they were transferred.

SEC. 2. This act shall take effect and be in force from and after its passage; the emergency existing for the immediate enforcement of this act being the pending of cases in Common Pleas Courts, that should be taken up at the next term of Circuit Courts.

Approved February 23rd, 1877.

AN ACT to encourage the Destruction of Grasshoppers.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. Any person who shall gather, or cause to be gathered by any person in his employ, eggs of the mountain locust or grasshopper, at any time after they are deposited in the earth, in the autumn of any year, and before they are hatched the following spring, shall be entitled to a bounty of five dollars for each and every bushel of eggs thus gathered, or for any quantity less than one bushel, bounty at the same rate to be paid, one-half by the state and one-half by the county in which they are gathered.

SEC. 2. Any person who shall gather, collect and kill, or cause to be so collected and killed, young and unfledged grasshoppers in the month of March, shall be entitled to a bounty of one dollar for each bushel; and for the month of April, fifty cents per bushel; and for the month of May, twenty-five cents per bushel, to be paid in the same manner as in the preceding section.

SEC. 3. Any person claiming bounty under this act shall produce the eggs and grasshoppers thus gathered or killed, as the case may be, before the clerk of the county court [of the county] in which such eggs or grasshoppers were gathered or killed, within ten days thereafter, whereupon said clerk shall administer to such person the following oath or affirmation: You do solemnly swear [or affirm, as the case may be], that the eggs [or grasshoppers, as the case may be], produced by you, were taken and gathered by you or by a person or persons in your employ or under your control, and within this county and state.

SEC. 4. The clerk shall forthwith destroy said eggs by burning the same, and give to the person proving up the same, under his hand and seal, a certificate setting forth in a plain handwriting, without interlineation, the amount of eggs or grasshoppers produced and destroyed by him, and the name and residence of such person producing the same, which certificate shall be in the following form:

State of Missouri, }
County of———. } This is to certify that in the county of ——, A. B. did this day prove before me that he had gathered or caused to be gathered —— of eggs —— grasshoppers, and is entitled to the sum of —— dollars and ——.

Given under my hand and seal of my office this —— day of ——, A. D. 18—.

A. B., Clerk County Court.

Which certificate shall be received and taken by the collector of revenue of the county in which the same was given, and such collector shall be allowed to pay out of the county and state treasury, one-half from each.

SEC. 5. Such clerk shall keep a register of all such certificates given by him, in a book which he shall keep for that purpose, in which he shall note down every certificate granted by him, the number and amount, and to whom granted, and transmit a certified copy of such register, under the seal of the court, to the treasurer of the state, who shall not allow and pay any certificate which does not correspond with such register.

SEC. 6. Such clerk shall receive for his services as aforesaid, one dollar for such certified copy of the register and the regular fee for the certificate and seal, and ten cents for each certificate granted under this act, all to be paid out of the treasury of his county.

SEC. 7. As the object of this act is the rapid destruction of the locust the ensuing spring, it shall take effect and be in force from and after its passage.

Approved February 23rd, 1877.

NOTES OF RECENT DECISIONS.

BANKRUPTCY—WHAT CONSTITUTES PARTNERSHIP—PARTNERSHIP CREDITOR MAY PROVE AGAINST ESTATE OF INDIVIDUAL DEBTOR.—*In re Jewett*, United States District Court, Eastern District of Wisconsin, 15 N. B. R. 126. Opinion by HOPKINS, J.: 1. A party, by his neglect of an ordinary duty, as to look after his interest, for an unreasonable length of time, when he knows his property is in the hands of and being managed by a third person, may be presumed to have approved of the management of the person having it in charge, and by such gross neglect be estopped from denying the existence of the authority that the party claiming to represent him exercised. In such cases neither community of interest nor participation in the profits is absolutely necessary. When a party holds himself out as a partner, and thereby procures credit upon the strength of his supposed relation, he is, on principles of natural justice, held to be such partner. But knowledge or notice of his being so held out must be brought home to him, or there must be proof of circumstances which will authorize a court to presume notice before he can be so charged. 2. Persons who have been adjudged bankrupt, as partners in one firm, may be subsequently declared bankrupts with another in another firm. 3. A good deal of discussion was had on the argument as to whether a partnership creditor could prove his debt against the estate of an individual partner, and, if so, whether his discharge would relieve him from such debts. The authorities on that point seem to be somewhat in conflict. But the court holds that the weight of authority is in favor of the view that such debts can be proven, and that, being provable, they are necessarily released by the discharge. *Ex parte* Crisp, 1 Atk. 133; *Ex parte* Elton, 3 Ves. 238; *Ex parte* Clay, 6 Ves. 813; *Ex parte* Chandler, 9 Ves. 35; *Ex parte* Dalton, 3 Rose, 389; Tucker v. Oxley, 5 Cranch, 34, opinion by Chief Justice Marshall, under act of 1800, which was substantially like the present law; *In re* Frear, 1 N. B. R. 660; Hudgins v. Lane, 11 N. B. R. 462; *In re* Melick, 4 N. B. R. 97; secs. 5069, 5115, and 5118, Rev. Sts.

REMOVAL OF CAUSES—PROBATE COURT.—*Craigie et al. v. McArthur*. United States Circuit Court, District of Minnesota, 1 Syllabi, 115. Opinion by Nelson, J.; Dillon, J., concurring. 1. A contest in regard to the distribution of the estate of a deceased person, where the amount involved is sufficient, and the citizenship of parties such as would confer jurisdiction, is a "controversy" that may be removed from the state to the federal courts, under the provisions of the act of March 3d, 1875. 2. Such removal, however, must be before trial in a court of original jurisdiction, and can not be made from a court to which, after hearing, an appeal has been taken. The act of Congress authorizes a removal from a court of limited or general jurisdiction, and a controversy in a probate court involving the distribution of an estate between parties who appear and submit to the jurisdiction and litigate therein, is certainly a suit of "a civil nature * * * in equity." 45 Me. 571; 4 Penn. State R. 301; 22 N. Y.

421; 20 Minn. R. 247; 19 Wis. R. 200. The probate court of the State of Minnesota is a constitutional court of record, with a seal and regular terms fixed by law. Sec. 1, art. 6, Const. Minn.; 2 Bis. St. 739; 1 Bis. St. 672, § 169. Its decrees, orders and judgment are binding upon all persons, and the right of appeal is given to the district court, and finally to the supreme court of the state. Pleadings are not necessary; but all applications made to the court, orally or in writing, are embodied in its records. At the time when the proceedings in that court assume the form of a controversy between parties, and the conditions requisite exist, the suit is removable. Gaines v. Fuentes *et al.*, 2 Otto, 14; 3 Cent. L. J. 373. But it is too late, after the determination of the litigated matters in the probate court, and an appeal taken to the district court of the state, to initiate steps for a removal. No such right, then, exists; and to entertain jurisdiction would be an attempt to exercise a revisory power over the judgment of the probate court, which is given by law to another tribunal. This court has entertained jurisdiction of the removal of a suit pending in a state court, on an appeal from commissioners appointed be that court to fix the value of property taken under the right of eminent domain by an incorporated company. 3 Dill. 165. But this appeal is of an entirely different character. In the former case the appeal was from an appraisement by commissioners authorized under the charter of the company, which provided for an appeal from the award to the district court, and, upon the appeal being taken, the clerk is authorized to set it down as a cause upon the docket of the court appointing the commissioners. A suit, then, for the first time, is instituted in a court. In this case the initiatory proceedings and contest were in a court recognized as one of the judicial tribunals of the State, and the appeal was from a decree of that court. The removal of a suit under the act of Congress of March 3d, 1875, must be from the court of original jurisdiction.

ABSTRACT OF DECISIONS OF ST. LOUIS COURT OF APPEALS.

October Term, 1876.

HON. EDWARD A. LEWIS, Chief Justice.
" ROBERT A. BAKEWELL, } Associate Justices.
" CHAS. S. HAYDEN, }

DAMAGE FROM EXCAVATION — NEGLIGENCE — LAWFUL ACT NEGLIGENTLY EXECUTED—CAUSE AND EFFECT.—In an action for damages resulting from giving way of earth under the walls of plaintiff's house, caused by defendant's carelessness and negligence in making excavations near said walls, by plaintiff's failure to allege that the excavation was wrongful, he admits that it was lawful in itself, and to recover, must prove negligence in executing the work. That the excavation was made, and about the same time the walls cracked, does not tend to prove negligence. Mere synchronism does not tend to establish the relation of cause and effect. [Citing Holman v. C. R. I. & P. R. R., 62 Mo. 562.] It was not only necessary for plaintiff to prove that the excavation caused the injury, but that it was the result of the negligence of defendant or its employees in executing the work. Judgment affirmed. Opinion by HAYDEN, J.—*Ward v. Andrews.*

EVIDENCE—BOOKS OF ORIGINAL ENTRY — ACCOUNTS AGAINST DECEDENTS—TRANSFER OF DISHONORED PAPER.—In an action against the administrator of a decedent, the books of plaintiff are not competent evidence where it appears that they are not the books of original entry. Plaintiff will not be permitted to testify to the correctness of his own account against deceased, but merely to the handwriting and date of entry. Plaintiff was not entitled to recover for services rendered more than five years prior to service of notice of claim on administrator. [Citing Hale's Exrs. v. Ard's Exrs, 48 Penn. St. 22.] A negotiable note, by reason of its dishonor, does not lose its negotiable character, so as to come within the provisions of § 8, p. 270 Wagner's Statutes, that the assignee of a bond, non-negotiable note or account may maintain an action against the assignor, upon failure to obtain payment from the obligor, maker or debtor, only in one of the following cases: Where he uses due diligence in the institution and prosecution of a suit against the obligor, maker or debtor," etc. [Citing Leavitt v. Putnam, 3 Comst. 494.] If originally negotiable, it may still pass from hand to hand after dishonor. The indorser will not be released by the insolvency of prior indorsers, so long as the holders remain passive. [Citing Sterling v. Marietta & S. T. Co., 11 Serg. & Rawle, 179; McLemore v. Powell, 12 Wheat. 554.] The transfer by indorsement of dishonored paper is in the nature of a sight or demand-draft on the original maker. [Citing Davis v. Francisco, 11 Mo. 575.] Demand and notice of non-payment is necessary as in other cases of negotiable paper. [Citing Hunt v. Wadleigh, 26 Me. 271; Greely v. Hunt, 21 Id. 455.] Insolvency of maker will not excuse demand and notice. [Citing Story on Prom. Notes, § 286.] Judgment affirmed. Opinion by LEWIS, C. J.—*Morgner v. Bigelow.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

October Term, 1876.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON, } Associate Justices.
" WARWICK HOUGH, }
" E. H. NORTON, }
" JOHN W. HENRY, }

CONSTITUTIONAL LAW — ACT LICENSING PEDDLERS.—The act licensing peddlers having been declared unconstitutional by the Supreme Court of the United States (Welton v. The State, U. S. Sup. Ct., 3 Cent. L. J., 116, on appeal from State v. Welton, 55 Mo. 288), a motion to quash an indictment found under that act ought to have been sustained. Opinion by SHERWOOD, J. (NAPTON, J., dissents.)—*The State v. Rowland.*

PROSECUTION FOR KEEPING DRAM-SHOP—SUFFICIENCY OF AFFIDAVIT — POWER OF COURT.—On a prosecution instituted by affidavit and warrant for keeping a dram-shop in violation of a city ordinance, this court can not pass upon the sufficiency of the affidavit, nor upon the constitutionality of the ordinance, neither of them being contained in the record on appeal. Opinion by SHERWOOD, C. J.—*City of Carthage v. Harper.*

APPEAL FROM JUSTICE OF THE PEACE—AFFIRMANCE FOR WANT OF NOTICE.—When the party appealing from the judgment of a justice of the peace fails to give notice of the appeal, as required by statute, before the second term of the appellate court after that to which such appeal is returnable, the judgment of the justice is properly affirmed. Rowley v. Hinds *et al.* 50 Mo. 403. Opinion by NORTON, J.—*The Town of Brownsville v. Rembert.*

MASTER AND SERVANT—NEGLIGENCE.—Where the plaintiff's servant worked for a sub-contractor of defendant in hauling rock with his team, but under the immediate direction and control of the defendant's superintendent, and the wagon and team were lost by the gross negligence of the defendant's superintendent, in ordering the servant to drive into a dangerous place, the defendant is liable for the damages caused by such negligence. Opinion by NAPTON, J.—*Cook v. The Han. & St. Jo. R. Co.*

PLEADINGS—ACTION ON SHERIFF'S BOND.—In an action on a sheriff's bond, for failing to account for taxes collected by him, although the averments of the petition are neither "so explicit nor as orderly as they might have been," yet, if the petition substantially alleges that the defendant was duly elected sheriff, qualified and gave bond, and collected taxes as sheriff for which he failed to account, a demurrer ought not to be sustained on the ground that the petition does not show for what years the taxes were collected, and does not aver that the sheriff had received any credit in his settlements for the taxes not paid over. Opinion by HOUGH, J.—*State to the use of Morgan Co. v. Lutman.*

MORTGAGE—WHEN INSUFFICIENT TO PASS WIFE'S ESTATE.—In a deed of mortgage, made by husband and wife,

of the wife's land, to secure the husband's debt, only the name of the husband appeared in the granting clause, and the wife's name did not appear except in the beginning, in connection with her husband, "as of the first part," the wife had no separate estate in the land. *Held*, that this instrument created no mortgage of, or valid charge upon, the wife's estate, either at law or in equity; and that purchasers under a valid deed of trust, made after the execution and recording of this instrument, took the title. Shroyer v. Nickell, 55 Mo. 264.] Opinion by SHERWOOD, C. J.—*Whiteley v. Stewart.*

CONSTRUCTION OF WILLS.—The rule in construing wills is to carry out the intention of the testator, and this is to be gathered from the whole taken together, rather than from isolated passages or expressions. So, where a testator gave all of his real estate, valued by him in the will at $3,880, to his son John, and gave to each of several other children and grand-children "one-fourth part of my estate, and also four hundred dollars additional, to equalize what I have heretofore given to my son John" (and made each $400 a charge on the land), it was *held* that the word "heretofore" was used in the sense of "hereinbefore;" and that "one-fourth part of my estate" referred only to the personal estate, and not to the real estate given to John by the first clause. Opinion by NORTON, J.—*Allison v. Chaney et al.*

EXECUTIONS—IRREGULAR IN FORM.—In a contest between the purchaser at a sale made by a marshal of the United States, on execution issued out of the district court, and purchasers from the heirs of the execution debtor who took their conveyance in 1845, the marshal's sale having occurred in 1825, although the executions were irregular in that they commanded the marshal to make the debt, interest and loss out of "the goods and chattels, lands and tenements," etc., instead of (as the state law then required) out of the goods and chattels, and "out of the lands and tenements, if sufficient goods and chattels could not be found whereof to levy the same," yet the law presumes that the officer did his duty, and levied on the realty only after he found that there were no goods and chattels; and, after the lapse of fifty years, this court will not declare his act void or insufficient. Opinion by NORTON, J.—*Baker v. Underwood.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

January Term, 1877.

[Filed at Ottawa, Jan. 31, 1877].

HON. BENJAMIN R. SHELDON, Chief Justice.
" SIDNEY BREESE,
" PINCKNEY H. WALKER,
" ALFRED M. CRAIG,
" JOHN SCHOLFIELD,
" JOHN M. SCOTT,
" T. LYLE DICKEY,
} Associate Justices.

SHERIFF—CIVIL LIABILITY FOR ESCAPE OF PRISONER.—When a sheriff negligently permits one in his custody, under an indictment for an assault with a deadly weapon upon B, with intent to inflict a bodily injury, to escape and go at large, and such person makes a further assault upon A, and threatens to take his life, whereby A is put to expense in having him bound over to keep the peace, A can not maintain an action on the case against the sheriff for the escape, nor for damages from the subsequent acts of the escaped prisoner, as they are not the natural and probable consequence of the escape. Opinion, per CURIAM.—*Hullinger v. Worrell.*

SPECIAL ASSESSMENTS—CONDEMNATION OF LAND FOR PARKS—WHO ARE CORPORATE AUTHORITIES OF A TOWN.—1. The supervisor and assessor of a town are the corporate authorities of the town to make special assessments for local improvements, within the meaning of the constitutional provision, article 1, secion 9. 2. The supervisor and assessor of the town of North Chicago have the power to make special assessments upon property benefited, for the purpose of condemning land within their town to be added to Lincoln Park, although a small part of the park is situated in another town. Opinion by BREESE, J.—*People ex rel. Huck v. Gage et al.*

SERVICE—SUFFICIENCY OF JURAT TO RETURN BY SPECIAL DEPUTY—WAIVER OF DEFECTS.—1. When a summons is served by a special deputy sheriff, who signs the sheriff's name by —— as special deputy, and immediately follows a jurat of a notary public, "subscribed and sworn to before me this" etc., it will be sufficient, and it will be presumed that the deputy was the party who was sworn to the return. 2. If a defendant, after default, appears on the assessment of damages, participates in selecting the jury, cross-examines witnesses, offers evidence, and orders an instruction, he will waive all objections to the service of the summons or return of service. Opinion by SCHOLFIELD, J.—*Ryan v. Driscoll.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF NORTH CAROLINA.

January Term, 1877.

HON. RICHMOND M. PEARSON, Chief Justice.
" EDWIN G. READE,
" W. B. RODMAN,
" W. P. BYNUM,
" THOMAS SETTLE,
} Associate Justices.

COMPLIANCE WITH ORDER OF COURT—TIME—CERTIFICATE OF OPINION NOT ISSUED IN TERM TIME.—Where no specific time is designated for compliance with an order of this court, it will always, before any ulterior proceedings are allowed, fix a time certain, at which the order shall be obeyed. It is contrary to the rules and course of this court, without a special order, to issue a certificate of any opinion or judgment in term time.—*Faircloth v. Isler.*

MURDER—PROVOCATION.—Words are not, but blows are a sufficient provocation to lessen the crime of homicide to that of manslaughter. The prisoner went to the house of the deceased and asked him if he had said that his (the prisoner's) sons had killed his hogs? And upon the deceased's admitting that he had said so, the prisoner shot at him with his gun; and missing him, ran after and to him, and stabbed him so that he died: *Held*, that this was murder. Also that the weapons used were, in contemplation of law, deadly.—*State v. Carter.*

SUIT FOR RECOVERY OF CROP—JURISDICTION.—Where a plaintiff rented land of the defendant during 1874, not for a part of the crop, and there was no evidence that he agreed to pay any stipulated money rent, or any money rent at all; *held*, that he could not recover one-third of the crop in an action commenced before a division of the same; nor could he recover for the use of the premises, the demand being less than $200, and within the jurisdiction of a magistrate.—*Foster v. Perry.*

WRITTEN CONTRACT VARIED BY PAROL EVIDENCE—CASE STATED.—The doctrine that a written contract can not be contradicted, added to, or taken from, by parol evidence, does not apply to every writing: *hence*, the following, executed by defendant: "For and in consideration of two hundred and ninety-eight dollars, I hereby transfer and assign to N. Beckwith, a certain judgment obtained by A. Wade, the plaintiff, against," etc., (describing the judgment). Signed: "A. Wade, by D. M. Carter, his attorney," is allowed to be explained by parol evidence, and the defendant to show, notwithstanding said paper, that he never received any money from Beckwith for Wade.—*Wade v. Carter.*

MORTGAGE—SALE WITHOUT DECREE OF FORECLOSURE—WHEN COURT WILL ENJOIN PARTIES.—A mortgagee with a power of sale, is a trustee;—in the first place, to secure the payment of the debt secured by the mortgage; and in the second place, for the mortgagor, as to the excess. Allowing a mortgagee to foreclose the equity of redemption by a sale made by himself, instead of a decree for foreclosure under sale made under a decree of court, was yielded to after much hesitation; and then on the ground, that in a plainer case it would save the expense of a suit in equity. But when there are equities to be adjusted, or if there is any complication in the account, showing the balance due, and the mortgagee had failed to demand payment of an ascertained balance, or when there are suggestions of oppression, usury and the like, the court would enjoin the mortgagee from settling; or if the sale had been made, the

mortgagee would be required to account for the fund, and show that all things had been done with perfect fairness, and after the mortgagor had been notified of the balance due, and had been allowed a reasonable time to pay the same. Coot on Mortgages, 124.—*Kornegay et al. v. Spicer.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

November Term, 1876.

HON. JAMES L. WORDEN, Chief Justice.
" HORACE P. BIDDLE,
" WILLIAM E. NIBLACK,
" SAMUEL E. PERKINS,
" GEORGE V. HOWK,
} Associate Justices.

MECHANIC'S LIEN—PLEADING.—A complaint to enforce a mechanic's lien on a building for lumber used in its construction is insufficient, if it does not aver that the lumber was furnished *for* the building. It is not sufficient to aver that the lumber was furnished to the contractor and used in the construction of the building. 45 Ind. 258. Judgment affirmed. Opinion by WORDEN, J.—*Crawford et al. v. Crockett et al.*

PRINCIPAL AND AGENT.—The act of an agent appointed by an agent will not bind the principal, unless the appointment of such sub-agent was by the authority, express or implied, of the principal, or was afterwards ratified by him. Where an account was placed in the hands of an attorney for collection, who brought suit thereon and recovered a judgment against the debtors, the latter could not claim a credit on said judgment for a sum which they had paid to a person occupying the same room with the attorney, but who failed to pay over said money to the creditors. Even though the attorney had ratified such person's act, the creditors would not have been bound by it, because, if the attorney could not authorize the act, he could not ratify it. Judgment affirmed. Opinion by BIDDLE, J.—*O'Conner v. Arnold.*

INFANCY — DISAFFIRMANCE OF CONTRACT — REPAYMENTS.—If an infant wishes to disaffirm a contract after coming of age, he must do it in toto. If he has property in his hands, acquired by the contract, the other party may reclaim it; but if the property has passed from him, or if he has received money, there is no obligation on him to account for the property, or refund the money. It is not necessary that the other party be placed in *statu quo*. Where a married woman, being a minor, sells her interest in certain real estate, receiving therefor $1,000, and joins with her husband in a conveyance thereof, and after arriving at full age, repudiates and disaffirms her contract, and recovers the real estate sold by a suit in partition against the grantee, the latter can not have an action to recover back the purchase-money paid for said real estate. Judgment affirmed. Opinion by WORDEN, C. J.—*Dill v. Bowen et al.*

COUNTY COMMISSIONERS — POWER TO MAKE ALLOWANCES—APPEALS.—Where a contractor had built a jail and sheriff's residence for a county, to the satisfaction of the board of commissioners, and had lost over $8,000 on the contract, and the board, being satisfied of the loss, in order to partially compensate the contractor, made an order allowing him the sum of $4,430.73 beyond the contract price, *held*, that the board, although not legally bound to pay beyond the terms of the contract, yet, the county having received the benefit of the contractor's work and materials under such a contract as produced a loss to him, had an equitable right to share such loss with him. Such board has the right to make allowances at its discretion; and where a matter thus rests entirely in the discretion of the board, and not upon any supposed legal obligation, no appeal lies from its action. 39 Ind. 40; 40 *Id.* 217. Judgment reversed. Opinion by WORDEN, C. J.—*Board of Commissioners of Carroll County v. Richardson et al.*

CONVEYANCES TO DEFRAUD CREDITORS — EXECUTED GIFTS—RIGHTS OF ADMINISTRATORS.—The doctrine is well settled in Indiana: 1. That the declarations of a vendor of property, made after he has parted with his title, are not admissible to impeach the title of any one claiming under him. 2. That a sale or conveyance of property to hinder or delay creditors is illegal as to creditors only; as between the parties and as to all others than creditors, it is legal and valid. 3. That it is not in the power of a husband to revoke an executed gift from him to his wife. And where the husband has thus put the title of property in his wife and afterwards sold it without her knowledge, taking notes therefor payable to himself, and the rights of creditors do not intervene, such notes are equitably the property of the wife, and the administrator of the deceased husband's estate can not legally claim or recover them. 4. That creditors of a decedent may recover property conveyed by the debtor in his life-time to defraud his creditors, and the administrator may institute the proper proceedings for that purpose; but he must show the existence of creditors at the time the conveyance was made. Judgment reversed. Opinion by HOWK, J.—*Garner v. Graves, Adm'r.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

January Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE,
" D. J. BREWER,
} Associate Justices.

EFFECT OF VOLUNTARY APPEARANCE—ATTACHMENT—DAMAGES—1. A voluntary appearance of a party to an action which recognizes the general jurisdiction of the court, or which is not made for the special purpose of contesting the jurisdiction of the court, or for any other special purpose, will be construed to be general appearance in the case, and will be held to give the court general jurisdiction in the case over such party. 2. Where a plaintiff, at the commencement of an action, obtains an order of attachment, which order is afterwards levied on the defendant's goods, and then the attachment is dissolved on motion of defendant; *held*, that the defendant can not, in the same suit, and without mentioning the attachment bond in his pleading, have any damage sustained by him on account of said attachment set off against the plaintiff's claim. Opinion by VALENTINE, J.—*Carver v. Shelly et al.*

SUMMONS ISSUED WITHOUT SEAL—WHEN VOID AND HOW CURED.—1. A summons issued without a seal from a district court is void. 2. In a case in the district court, where a judgment is rendered upon default, and such judgment is assailed in the supreme court, because the court had no jurisdiction of the defendants for the alleged reason that the summons was not attested with the seal of the court, and nothing is presented to the supreme court to sustain the said claim, except the transcript of the record of the court below, which fails to show on the copy of the summons set forth any seal annexed thereto, but the journal entry of the judgment states, the court found, "that due personal service of summons was made upon the said defendants as required by law;" *Held*, such finding and adjudication of the court are *prima facie* evidence of the legal authentication of the summons with the seal, and, *held*, that said judgment will not be reversed upon the record as above stated. Opinion by HORTON, C. J.—*Dexter et al. v. Cochran et al.*

ACTION ON ADMINISTRATOR'S BOND—WHEN COMMISSIONS FOR SERVICES NOT ALLOWED—OTHER CLAIMS.—1. In an action brought upon the official bond of an administrator, whose letters have been revoked, where such administrator has failed to make any settlement as required by law, has refused to account for the moneys collected, and compels his successor of the trust to resort to litigation to protect the rights of the estate; *held*, that neither such administrator nor his sureties can reduce the amount due the estate by the commissions of six per centum allowed administrators for their services under section 162, Gen. Stat. 1868, page 468. 2. In an action brought upon the official bond of an administrator to recover money due an estate, where the defendants attempt to reduce the amount sued for by a claim for fees in a suit in the district court, but fail to show that the same is a valid charge against the estate, and fail to show its payment; *held*, not error for the court below to reject the claim. Opinion by HORTON, C. J.—*Dryfoos et al. v. Cullinan.*